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In the Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL-ODAH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Rules of Evidence and 28 U.S.C. § 2246 limit the admissibility of hearsay in a habeas corpus case challenging indefinite imprisonment, potentially for life.

2. Whether a preponderance of the evidence standard, rather than a clear and convincing evidence standard, is sufficient under the Due Process Clause of the Constitution and 28 U.S.C. § 2241 to support a ruling in favor of indefinite imprisonment, potentially for life.

PARTIES TO THE PROCEEDING BELOW

The appellants in the proceeding below were Fawzi Khalid Abdullah Fahad Al-Odah and his next friend, Khaled Al-Odah.

The appellees in the proceeding below were the United States of America and the respective successors of George W. Bush, Donald Rumsfeld, Richard B. Myers, Rick Baccus and Terry Carrico in their official capacities.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Fawzi Khalid Abdullah Fahad Al-Odah, along with his next friend, Khaled Al-Odah, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The unclassified version of the opinion of the District Court (Kollar-Kotelly, J.) denying Petitioner's habeas corpus petition is available at *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009), and is reprinted at Appendix B (App. a21-a57). The unclassified version of the opinion of the Court of Appeals affirming the District Court's decision is available at *Al Odah v. United States*, 611 F.3d 8 (D.C. Cir. 2010), and is reprinted at Appendix A (App. a1-

a20). The classified versions of both opinions are maintained under the direction of the Court Security Office and can be provided to the Court if required.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

APPLICABLE PROVISIONS

U.S. Const. amend. V; 28 U.S.C. §§ 2241 and 2246; Fed. R. Evid. 802 and 1101(e). These provisions are set forth in relevant part in Appendix F (App. a74-a77).

INTRODUCTION

In *Boumediene v. Bush*, this Court held that prisoners at Guantanamo, no less than any other person imprisoned by the government, are entitled to invoke the writ of habeas corpus to seek their liberty. As the Court there noted, "Within the Constitution's separation-of-powers structure, few exercises of judicial power are as legitimate or as necessary as the responsibility to hear challenges to the authority of the Executive to imprison a person." 553 U.S. 723 , 797 (2008). Such judicial review, however, is only as meaningful as the procedures that are adopted to effectuate the Great Writ. By ignoring the plain language of the Federal Rules of Evidence, which are applicable by their terms to habeas corpus proceedings, and by applying a lower standard of proof than has ever been approved by this Court for review of prolonged detention, the District Court and the Court of Appeals have effectively gutted this Court's holding in *Boumediene* that habeas corpus is a fun-

damental right to which detainees in Guantanamo are entitled. This Court should not permit its decision to be undermined by the lower courts through such procedural unfairness.

Specifically, both the District Court and the Court of Appeals have disregarded the plain language of the Federal Rules of Evidence enacted by Congress and have allowed the indiscriminate admission of hearsay, denying the detainees any meaningful opportunity to test the reliability of statements made against them. The courts below have also applied a burden of proof lower than any ever approved by this Court in a case involving prolonged imprisonment, allowing the government to justify indefinite detention by a mere preponderance of the evidence, rather than by clear and convincing evidence. The result of these procedures are habeas hearings that lack meaningful, rigorous standards by which to admit evidence and make ultimate factual determinations. Such procedures advance neither the nation's national security, nor the rule of law, nor the values that habeas proceedings vindicate. Instead, these avoidable defects further degrade and diminish any remaining confidence in the ongoing system of indefinite military confinement.

While these procedural questions arise in the specific context of the Guantanamo cases, they will have a broader and more longstanding impact. The Guantanamo cases will establish the procedures for habeas proceedings of all prisoners in connection with the current armed conflict who are entitled to seek relief under 28 U.S.C. § 2241, potentially including even United States citizens detained within the United States (*see, e.g.*, *Hamdi v. Rumsfeld*, 542 U.S.

507 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004)). This Court therefore should grant review and reverse the decision below to ensure that *Boumediene's* core principle – that no one may be imprisoned without a fair hearing before an independent judicial officer – is not rendered hollow by the flawed procedures adopted by the lower courts.

STATEMENT OF THE CASE

Petitioner has been imprisoned as an alleged enemy combatant at the U.S. Naval Base at Guantanamo for almost nine years. He and eleven other Kuwaiti detainees filed their complaint in this case, through their next friends, on May 1, 2002, making this case the oldest pending case challenging indefinite detention under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Along with his father and next friend, Khaled Al-Odah, Petitioner was the lead petitioner in *Al Odah v. United States*, No. 03-343, *decided sub nom.*, *Rasul v. Bush*, 542 U.S. 466 (2004), in which this Court held that the District Court had jurisdiction under 28 U.S.C. § 2241 over habeas corpus cases brought by detainees held at Guantanamo, and that those detainees, "no less than American citizens," have the right to challenge the legality of their detention in the U.S. courts through habeas actions. 542 U.S. at 481. In *Rasul*, this Court remanded the cases for consideration by the District Court, but did not address what procedures the district court would apply in deciding this and other habeas corpus cases. "Whether and what further proceedings may become necessary after respondents make their response to the merits of petitioners' claims are matters that we need not address now." *Id.* at 485.

On remand in the District Court, the government moved to dismiss, claiming that prisoners in Guantanamo lacked any rights that the District Court could enforce. The District Court denied the government's motion in relevant part but granted the government leave to file an interlocutory appeal. *See In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 481 (D.D.C. 2005). While the interlocutory appeal was pending, Congress enacted the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, which purported to strip the federal courts of habeas corpus jurisdiction in cases filed by alleged enemy combatants. The Court of Appeals then ruled that the Military Commissions Act did not violate the Suspension Clause of the Constitution and ordered the habeas cases dismissed for lack of jurisdiction. *Al Odah v. United States*, No. 05-5063, *decided sub nom., Boumediene v. Bush*, 476 F.3d 981 (2007).

Petitioner was the lead petitioner in *Al Odah v. United States*, No. 06-1196, *decided sub nom., Boumediene v. Bush*, 553 U.S. 723 (2008), in which this Court reversed the Court of Appeals and held that the jurisdiction-stripping provision of the Military Commissions Act was invalid under the Suspension Clause. This Court again remanded the detainees' cases for consideration by the District Court, but again did not address what procedures the District Court would apply in deciding the cases, leaving it to the District Court to decide evidentiary and other procedural issues "in the first instance." *Boumediene*, 553 U.S. at 733. This Court suggested that the government would bear the burden of establishing the facts justifying confinement, but left for another day the question of what that burden should be. "The ex-

tent of the showing required of the Government in these cases is a matter to be determined. We need not explore it further at this stage." *Id.* at 787.

Upon remand, the District Court consolidated Petitioner's case with the habeas cases of most other Guantanamo detainees before Senior Judge Thomas F. Hogan for the purpose of coordinating the cases and setting hearing procedures (subject to modification by the individual trial judges). The parties jointly briefed their positions on the principal disputed procedural issues including, most importantly, the standard for admissibility of hearsay evidence and the burden of proof to be applied. Petitioner and other habeas petitioners argued that admissibility of hearsay is governed by the Federal Rules of Evidence and 28 U.S.C. § 2246, and that the government should bear the burden of proof by clear and convincing evidence. The government argued that all hearsay is admissible without regard to the Federal Rules of Evidence and the habeas statute, and without regard to whether it was reliable or necessary. The government further argued that it should bear the burden only of submitting "credible evidence" in its factual returns, and that the burden should then shift to the habeas petitioners to rebut the government's evidence with "more persuasive evidence."

The District Court issued its Case Management Order, provisionally ruling that hearsay would be admissible without regard to the Federal Rules of Evidence or the habeas statute so long as the party offering the hearsay could show that it was reliable and that offering non-hearsay evidence would pose an undue burden or would interfere with protection of national security. The District Court further ruled

that the government would bear the burden of proof, but only by a preponderance of the evidence.[1]

Following the issuance of the Case Management Order, Petitioner's case was returned to Judge Colleen Kollar-Kotelly for hearing on the merits. The government did not call a single witness at the hearing, nor did it offer any testimony by affidavit relating directly to Petitioner. The only evidence offered by the government at the hearing consisted of 162 documentary exhibits, largely consisting of unsworn interrogation reports of subjects about whom little or nothing is known, most of which were taken years after the fact under undisclosed circumstances by unknown interrogators whom the government did not make available for cross-examination or to answer interrogatories. Petitioner objected to most of the government's exhibits on hearsay grounds, and on the ground that the government did not even attempt to make the showing specified by the Case Management Order that the hearsay was reliable and that offering non-hearsay evidence would pose an undue burden or would interfere with protection of national security.

The District Court admitted all of the government's exhibits into evidence, including those that did not fit within any exception to the rule against hearsay, and in spite of the lack of any evidence that the hearsay evidence was either reliable or necessary. *See* App. a25-a25 and a61. For example, the

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[1] The Case Management Order was later amended in certain respects not pertinent to Petitioner's appeal. A copy of the Case Management Order is attached as Appendix E.

District Court relied on unevaluated raw intelligence reports of interrogations of other detainees to support its conclusions that Petitioner followed a route to Afghanistan traveled by others who allegedly went there for the purposes of jihad (App. a36-a38), that he was captured with another individual with alleged ties to al-Qaeda (App. a44), and that he attended the al-Farouq training camp (App. a51-a55). On August 24, 2009, the District Court issued its judgment applying a preponderance of the evidence standard and denying Petitioner's habeas corpus petition. The District Court made clear in its opinion that it considered all hearsay, regardless of its admissibility under the Federal Rules of Evidence and the habeas statute, and without any reference to the hearsay standard articulated in the Case Management Order. *See* App. a25-a26.

Petitioner appealed to the Court of Appeals on the grounds, among others, that the District Court erred by admitting hearsay evidence and by applying a preponderance of the evidence standard of proof. Jurisdiction was proper in the Court of Appeals pursuant to 28 U.S.C. § 1291. While Petitioner's appeal was pending, a panel of the Court of Appeals decided *Al-Bihani v. Obama*, 590 F.3d 866, *rehearing denied*, __ F.3d __ (D.C. Cir. 2010), a case involving another Guantanamo detainee. Without even addressing the plain language of Fed. R. Evid. 1101(e), which applies the Federal Rules of Evidence to habeas corpus cases, the panel held in *Al-Bihani* that hearsay "is always admissible," and that the district court's only evidentiary task is to assess the amount of probative weight to ascribe to hearsay evidence. 590 F.3d at 879. The panel in *Al-Bihani* also addressed the stan-

dard of proof. Noting first that this Court had not answered the question in *Boumediene*, the panel held, "[a]bsent more specific and relevant guidance," that the preponderance of the evidence standard was adequate. *Id.* at 878. The Court of Appeals subsequently ruled the same way in *Awad v. Obama*, 608 F.3d 1, *rehearing denied*, __ F.3d __ (D.C. Cir. 2010), citing *Al-Bihani*.

Applying what it determined to be binding precedent in *Al-Bihani* and *Awad* concerning the admissibility of hearsay and the standard of proof, the Court of Appeals affirmed the District Court's decision denying Petitioner's request for a writ of habeas corpus. *See* App. a10-a13.

REASONS FOR GRANTING THE WRIT

This case presents the two most significant procedural questions the courts below have addressed in attempting to implement this Court's decision in *Boumediene* that the detainees are entitled to meaningful habeas corpus hearings: whether the plain requirements of the Federal Rules of Evidence apply to habeas corpus proceedings, and what is the appropriate standard of proof. These questions are fundamentally important to the fairness and accuracy of future habeas reviews of the detentions of the many detainees who are now held or will in the future be held in Guantanamo or elsewhere within the territorial jurisdiction of the United States under the Authorization for Use of Military Force. The Court of Appeals has decided these questions, but its decisions contravene the plain language of the Federal Rules of Evidence, the habeas statute, and prior decisions of this Court. The procedures adopted by the

Court of Appeals contravene the purpose of *Boumediene*.

Indeed, by allowing wholesale reliance on hearsay without regard to the standards of admissibility established by the Federal Rules of Evidence, and by applying a standard of proof ill-suited for deciding whether a person should spend potentially the rest of his or her life in prison, the decision of the Court of Appeals departs from centuries of accumulated experience under the Constitution and the rule of law. It is no more in the interests of the United States than of present and future detainees for the law relating to indefinite, preventive detention to be built on such a shaky foundation.

Now that the lower courts have determined "in the first instance" the procedures to govern the habeas hearings mandated by *Boumediene*, this Court should decide, on the full record of this case, whether and to what extent the courts are free to ignore the Federal Rules of Evidence and whether a preponderance of the evidence is sufficient to support potential life imprisonment. Certiorari is appropriate under S. Ct. R. 10(c) because the Court of Appeals has decided important questions of federal law involving the proper balance between national security interests and fundamental liberty interests that have not been, but should be, settled by this Court, and because it has decided these important questions in a way that is contrary to the Federal Rules of Evidence, 28 U.S.C. §§ 2241 and 2246, and relevant decisions of this Court.

I. The Court of Appeals Undermined the Right Upheld in *Boumediene* by Ignoring the Plain Language of the Federal Rules of Evidence.

The Federal Rules of Evidence apply in habeas corpus cases under 28 U.S.C. § 2241 "to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority . . . ." Fed. R. Evid. 1101(e).[2] As explained in the Notes of the Advisory Committee on Rules,

> The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker v. Johnston*, 312 U.S. 275, 61 S. Ct. 574, 85 L. Ed. 830 (1941), that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L. Ed. 2d 770 (1963), upon trial-type proceedings, *Id.* 311, 83 S. Ct. 745, with demeanor evidence as a

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[2] In the absence of § 7 of the Military Commissions Act of 2006, which this Court struck down in *Boumediene*, the habeas statute that applies to Petitioner's case is 28 U.S.C. § 2241. *See Boumediene*, 553 U.S. at 777; *see also Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010) ("[*Boumediene*] necessarily restored the *status quo ante*, in which detainees at Guantanamo had the right to petition for habeas under [28 U.S.C.] § 2241.").

> significant factor, *Id.* 322, 83 S. Ct. 745, in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Accordingly, the District Court should have applied the Federal Rules of Evidence in Petitioner's case, except as otherwise established by statute or applicable rule. The habeas statute provides a limited exception to the hearsay rule by allowing admission of affidavits in the court's discretion, but that exception triggers the opposing party's "right to propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246. Otherwise, hearsay is excluded under Fed. R. Evid. 802 unless it falls within an exception set forth in Fed. R. Evid. 803 through 807. The Court of Appeals, on the other hand, allowed the unrestricted admissibility of hearsay. "[T]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence." App. a12 (quoting *Awad*, 608 F.3d at 7). The court relied upon its precedent in *Al-Bihani*, which held "the question a habeas court must ask when presented with hearsay is not whether it is admissible - *it is always admissible* - but what probative weight to ascribe to whatever indicia of reliability it exhibits." *Al-Bihani*, 590 F.3d at 879 (emphasis added). This holding contradicts the plain language of the Federal Rules of Evidence.

Within constitutional limits, there is no doubt that Congress could change the procedures and rules of evidence applicable to habeas corpus cases. This Court also has the authority to change the procedur-

al rules and rules of evidence pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, *et seq.* But unless and until the habeas statute and the Federal Rules of Evidence are changed, there is no need for this Court to address the constitutional limits. Similar to the situation presented in *Walker v. Johnston*, 312 U.S. 275, 285 (1941),

> It is not a question what the ancient practice was at common law or what the practice was prior to 1867 when the statute from which [the habeas statute] is derived was adopted by Congress. The question is what the statute requires.

In this case, as in all habeas corpus cases under 28 U.S.C. § 2241, the Federal Rules of Evidence, as adopted by statute, require exclusion of hearsay unless it falls within a hearsay exception set forth in Fed. R. Evid. 803 through 807, or as provided by statute. Neither the Court of Appeals nor the District Court was free to disregard those statutory requirements.

In deciding that hearsay is "always" admissible in habeas corpus cases, the Court of Appeals relied on language in this Court's plurality opinion in *Hamdi*, stating that hearsay "may need to be accepted as the most reliable available evidence . . . ." *Al-Bihani*, 590 F.3d at 879 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34 (2004)). But the *Hamdi* plurality's uncontroversial statement does not support the conclusion that there is no restriction on hearsay at all, or that hearsay may be accepted in a manner contrary to rules established by Congress and this Court. There is no indication that the *Hamdi* plurality intended to modify or repeal Fed. R. Evid. 1101(e),

which specifically applies the rules of evidence to habeas corpus cases.[3] As this Court has held, its decisions must not be interpreted to modify procedural rules in the absence of the procedures required by the Rules Enabling Act:

> The procedure Congress ordered for such changes [to procedural rules], however, is not expansion by court decision, but by rulemaking under [28 U.S.C.] § 2072. Our rulemaking authority is constrained by §§ 2073 and 2074 . . . .

Swint v. Chambers County Comm'n, 514 U.S. 35, 48 (1995). The Court of Appeals should have applied similar restraint before casting aside the Federal Rules of Evidence and the habeas statute.

Rather, the plurality opinion in *Hamdi* must be read consistently with Fed. R. Evid. 802, which prohibits the admission of hearsay unless it falls within a recognized exception. The District Court had ample discretion to admit hearsay under one of the many exceptions to the hearsay rule, or in an affidavit following the procedures set forth in 28 U.S.C. § 2246. For example, capture reports and other records made contemporaneously with the prisoner's capture would typically be admissible either as records of

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[3] Indeed, the only hearsay evidence mentioned by the plurality in *Hamdi* is affidavit evidence, which, as noted earlier, is expressly permitted by the habeas statute, 28 U.S.C. § 2246. *Hamdi*, 542 U.S. at 538 ("As we have discussed, a habeas court in a case such as this may accept affidavit evidence . . . so long as it also permits the alleged combatant to present his own factual case to rebut the Government's return.").

regularly conducted activity under Fed. R. Evid. 803(6) or as public records under Fed. R. Evid. 803(8). *See Hamdi*, 542 U.S. at 534. The U.S. Army's own regulations require such records to be kept on standard Department of Defense forms both with the capturing unit and with the prisoner upon transfer. *See* Army Regulation 190-8, ¶ 2-1(a)(1) (June 1, 1992). Although these records could be the best evidence of the cause of confinement, they were not presented in Petitioner's case. Government officials with relevant knowledge could testify through affidavits under 28 U.S.C. § 2246 without ever coming to court, provided that the Petitioner is given an opportunity to propound interrogatories or obtain an answering affidavit as set forth in the statute. Even statements by former detainees or other witnesses might be admissible under certain circumstances as statements against interest under Fed. R. Evid. 804(b)(3) if the government shows that the declarant is unavailable and that he truly would have perceived that his statements were so much against his interests that a reasonable person in his position would not have made them unless they were true. And if no other hearsay exception applies, the District Court would always have the discretion to admit hearsay under the residual exception in Fed. R. Evid. 807 in appropriate circumstances if the hearsay has circumstantial guarantees of trustworthiness and is more probative than any other evidence that the proponent can procure through reasonable efforts. The District Court thus had ample discretion to consider many forms of hearsay pursuant to the Federal Rules of Evidence. The Court of Appeals erred, however, in concluding that the District Court had discretion to

consider inadmissible hearsay without regard to the Federal Rules of Evidence.

Either Congress or this Court could change the Federal Rules of Evidence to accommodate the particular circumstances of a class of habeas cases such as Petitioner's. There are strong policy reasons, however, why the Federal Rules of Evidence should not be changed to allow unrestricted use of hearsay evidence in cases of this sort. The raw, untested interrogation reports of fellow prisoners of unknown credibility, with unknown motivations, made under uncertain circumstances years after the fact have been demonstrated time and again to be too unreliable to base judicial decisions upon them. But this Court need not address the policy considerations in Petitioner's case. The rule is unambiguous. The Court of Appeals erred in ruling that hearsay is "always" admissible as evidence in a habeas case.

II. The Court of Appeals Undermined the Right Upheld in *Boumediene* by Approving a Preponderance of the Evidence Standard to Uphold Indefinite Detention.

The Court of Appeals erred by approving the application of a preponderance of the evidence standard to Petitioner's case. This minimal standard is particularly inappropriate in a situation where Petitioner was detained without access to any factfinding court for more than seven years before his case was heard, and where the evidence presented was stale and almost entirely flimsy and untestable hearsay. With essentially no judicial gatekeeping on the quality of evidence, there must be some heightened standard

for the quantum of evidence to justify indefinite imprisonment.

In fact, no decision by this Court has ever approved anything less than proof by clear and convincing evidence in a case involving prolonged detention. The preponderance of the evidence standard requires nothing more than that the factfinder believe "that the existence of a fact is more probable than its nonexistence." *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 622 (1993) (internal citation and quotations omitted). This standard is used principally in suits involving "a monetary dispute between private parties," where it is appropriate for the litigants to "share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. 418, 423 (1979). In such cases, it is "no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor." *In re Winship*, 397 U.S. 358, 371 (1970). However, when "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money," then it is appropriate to "reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Addington*, 441 U.S. at 424. This Court has held, for example, that in spite of society's undoubted interest in detaining an individual who poses a danger to himself or others as a result of a mental disorder, "the individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence." *Id.* at 427. *See also*

Woodby v. INS, 385 U.S. 276, 286 (1966) (holding that alien deportation orders must be supported by "clear, unequivocal and convincing evidence").[4]

Similarly, society has an undoubted interest in detaining members of enemy armed forces for the duration of the hostilities. But when the individual's membership in the enemy armed force is doubtful – where, as here, the individual is not wearing the uniform of an enemy armed force and is not captured on or near a battlefield – the liberty interest involved is too weighty to run the risk of falsely imprisoning a person based on a mere preponderance standard. Even in the civil context, this Court has upheld substantial deprivations of liberty only when justified by clear and convincing evidence. *See Woodby*, 385 U.S. at 286 (deportation); *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997) (civil commitment of sex offenders); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (civil commitment of criminal defendant found not guilty by reason of insanity); *United States v. Salerno*, 481 U.S. 739, 750 (1987) (pre-trial detention based on dangerousness).

In *Al-Bihani*, the Court of Appeals cited to *In re Yamashita*, 327 U.S. 1, 8 (1946), for the proposition that "traditional habeas review did not entail review

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[4] The question is not simply whether a clear and convincing evidence standard is itself constitutionally compelled. Given that some process necessarily is due to make Petitioner's right to habeas meaningful, the appropriate burden of proof "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby*, 385 U.S. at 284. And, as noted above, this Court has never upheld prolonged imprisonment based on a standard of proof lower than clear and convincing evidence.

of factual findings, particularly in the military context," and to 28 U.S.C. § 2254(e)(1) for the proposition that "the burden in some domestic circumstances has been placed on the petitioner to prove his case under a clear and convincing standard." *Al-Bihani*, 590 F.3d at 878. Both of the circumstances cited by the Court of Appeals involve habeas review of a prior judgment of another tribunal before which the government bore the burden of proof beyond a reasonable doubt. Neither has any application to Petitioner's case, where habeas review was his first and only opportunity to challenge his imprisonment before any court.

As Judge Green in the District Court observed in an earlier stage of this case:

> Short of the death penalty, life imprisonment is the ultimate deprivation of liberty, and the uncertainty of whether the war on terror - and thus the period of incarceration - will last a lifetime may be even worse than if the detainee had been tried, convicted, and definitively sentenced to a fixed term.

In re Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 465-66 (D.D.C. 2005). The extent of deprivation of liberty in Petitioner's case - measured either in terms of the length of the confinement or its indeterminate nature - equals or exceeds the impact of any other non-criminal detention, and, as in other cases of civil confinement, calls for a heightened burden of proof.

CONCLUSION

The lower courts have now addressed the procedural issues that this Court left open as an initial matter in *Boumediene*. The application of the Federal Rules of Evidence in habeas corpus cases such as Petitioner's and the standard of proof required to justify indefinite detention are important questions of federal law, decided wrongly by the Court of Appeals in a way that undercuts rather than upholds the right recognized in *Boumediene*. This Court should grant this petition to make clear that habeas proceedings must be conducted in the manner required by Congress in the Federal Rules of Evidence and the habeas statute and to make clear that the Executive may impose indefinite, potentially lifelong imprisonment only upon proof by clear and convincing evidence.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued April 6, 2010 Decided June 30, 2010

No. 09-5331

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

Before: SENTELLE, *Chief Judge*, ROGERS and GARLAND, *Circuit Judges*.

Opinion for the Court filed by Chief Judge SENTELLE .

SENTELLE, *Chief Judge*: Fawzi Khalid Abdullah Fahad al Odah, a detainee at Guantanamo Bay, Cuba, and his next friend appeal from the district court's denial of his petition for a writ of habeas corpus. Appellants contend that the preponderance of the evidence standard employed by the district court is unconstitutional. That argument is foreclosed by precedent. Appellants further contend that the district court erred in admitting hearsay evidence.

Again, controlling precedent is against them. Lastly, they argue that the evidence is insufficient to show that al Odah was "part of" al Qaeda and Taliban forces. We hold that the evidence is sufficient to support the district court's finding. Accordingly, we affirm the district court's denial of al Odah's petition for a writ of habeas corpus.

I. BACKGROUND

The legal framework that governs habeas petitions from detainees held at Guantanamo Bay, Cuba has been thoroughly explained in *Al-Bihani v. Obama*, 590 F.3d 866, 869 (D.C. Cir. 2010) and *Awad v. Obama*, No.09-5351, __ F.3d __, 2010 U.S. App. LEXIS 11623, *5-*12 (D.C. Cir. June 2, 2010). As relevant to this appeal, *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), held that federal courts have jurisdiction over habeas petitions from individuals detained at Guantanamo Bay, Cuba. The Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) ("AUMF"), provides:

> That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

This gives the United States government the authority to detain a person who is found to have been

"part of" al Qaeda or Taliban forces. *See Awad*, 2010 U.S. App. LEXIS 11623 at *26; *Al-Bihani*, 590 F.3d at 871-72; *see also Barhoumi v. Obama*, No. 09-5383, __ F.3d __,2010 U.S. App. LEXIS 12847, *18 (D.C. Cir. June 11, 2010).

A. Factual Background

Fawzi Khalid Abdullah Fahad al Odah ("al Odah") was born in Kuwait City, Kuwait in 1977. In August of 2001, al Odah traveled to Afghanistan. Al Odah, a teacher, contends that he went there to do charity work and teach the Koran to the poor and needy for two weeks before the start of his next school year. The government contends that al Odah's purpose in making the trip was to join the Taliban in its fight against the Northern Alliance.

On August 13, 2001, al Odah paid cash for a one-way ticket and flew from Kuwait to Dubai, United Arab Emirates. The next day, he paid cash for a one-way ticket and flew from Dubai to Karachi, Pakistan. Al Odah stayed in Karachi for a day or two, and then paid cash for a one-way ticket and flew from Karachi to Quetta, Pakistan. Al Odah then traveled by car from Quetta, Pakistan to Spin Buldak, Afghanistan.

In Spin Buldak, al Odah met with a man named [TEXT REDACTED BY THE COURT]. [TEXT REDACTED BY THE COURT] was an official with the Taliban government. Al Odah claims that he met with [TEXT REDACTED BY THE COURT] seeking guidance on where he could teach the Koran. The United States asserts that al Odah sought out a Taliban official to find information on joining al Qaeda and the Taliban. Al Odah contends that [TEXT REDACTED BY THE COURT] took him around the

countryside to teach at several schools in the area. The government argues, and the district court found, that this contention was not credible because al Odah could not provide the names of any of the students he taught, the names of any of the schools at which he taught, or the names of any of his fellow teachers.

After some period of time, [TEXT REDACTED BY THE COURT] took al Odah to a Taliban-run camp for a day. While at this camp, al Odah admits that he engaged in target shooting with a Kalashnikov AK-47 rifle. At some point (exactly when is unclear), al Odah then traveled with [TEXT REDACTED BY THE COURT] from Spin Buldak to Kandahar.

Al Odah was in Kandahar on the day of the September 11, 2001 terrorist attacks. After September 11, on [TEXT REDACTED BY THE COURT]'s recommendation, al Odah rented a car and drove from Kandahar to Logar Province, Afghanistan. Al Odah argues that he made this trip to try to stay safe and get out of Afghanistan. The government points out that if al Odah felt unsafe, he could have left Afghanistan more quickly by retracing the route by which he arrived.

While in Logar Province, al Odah sought out [TEXT REDACTED BY THE COURT], a man recommended by [TEXT REDACTED BY THE COURT]. The evidence indicates that al Odah stayed in Logar Province at [TEXT REDACTED BY THE COURT]'s home, free of charge, for about a month. Al Odah left his video camera, passport, and other documents with [TEXT REDACTED BY THE COURT]. There is

no evidence as to what al Odah did during this month.

After his time in Logar Province, al Odah, at [TEXT REDACTED BY THE COURT]'s suggestion, traveled to Jalalabad, Afghanistan. In Jalalabad, al Odah stayed with a man named [TEXT REDACTED BY THE COURT]. There were a number of other people staying in [TEXT REDACTED BY THE COURT]'s house. Some of the men there carried weapons. Al Odah stayed at [TEXT REDACTED BY THE COURT]'s house for about ten days. At some point during these ten days, [TEXT REDACTED BY THE COURT] gave al Odah a Kalashnikov AK-47 rifle.

Al Odah then left Jalalabad and, on foot, headed through the White Mountains in the Tora Bora region. He traveled with a group of about 150 men, some of whom were armed. Al Odah carried his AK-47 with him throughout this journey. The group with which al Odah was traveling was attacked by US and allied air strikes, but al Odah himself was never injured.

When al Odah reached the Afghanistan-Pakistan border, he was detained by Pakistani guards. The exact date he was detained is disputed, but it was sometime between mid-November and mid-December 2001. At the time of his capture, al Odah still had his AK-47 with him. Al Odah was transferred to US custody, and has been detained at Guantanamo Bay, Cuba since early 2002.

Since al Odah's initial detention, additional incriminating evidence has come to light. [TEXT REDACTED BY THE COURT] Additionally, al Odah's

name and phone number appeared on a document on al Qaeda's official web site. [TEXT REDACTED BY THE COURT] Lastly, al Odah's passport, which he left with [TEXT REDACTED BY THE COURT] in Logar Province, was later recovered from an al Qaeda safehouse in Karachi, Pakistan. Also at this safehouse, an individual named [TEXT REDACTED BY THE COURT] was captured.

B. Procedural Background

On May 1, 2002, al Odah, through his next friend, Khaled al Odah, along with eleven other Guantanamo Bay detainees filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia. Since then, the habeas petitions have been the subject of extended litigation involving jurisdictional questions. *See Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002); *Al-Odah v. United States*, 321 F.3d 1134, 355 U.S. App. D.C. 189 (D.C. Cir. 2003); *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443 (D.D.C. 2005); *Boumediene v. Bush*, 476 F.3d 981, 375 U.S. App. D.C. 48 (D.C. Cir. 2007); *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008). After *Boumediene v. Bush* established that the district court had jurisdiction to hear al Odah's petition, the court considered al Odah's petition on the merits.

After receiving the government's factual return and the parties' various filings, the district court held a three-day hearing. On August 24, 2009, the district court denied al Odah's petition for a writ of habeas corpus. *Al Odah v. United States*, 648 F. Supp. 2d 1 (D.D.C. 2009).

In *Hamdi v. Rumsfeld*, 542 U.S. 507, 533-34, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004) (plurality op.), the Supreme Court said:

> [T]he exigencies of the circumstances may demand that, aside from these core elements, enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding.

Relying upon this language from the Supreme Court, the district court stated that it would allow the use of hearsay by both parties. 648 F. Supp. 2d at 4-5. The district judge reasoned "[t]he Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable . . . ." *Id.* at 5. The court denied the government's motion to have its evidence admitted with a presumption of accuracy and authenticity. *Id.* at 5-6. The court then discussed how intelligence documents can be unreliable. *Id.* With regards to al Odah's motion to exclude certain pieces of evidence, the court declined to do so, and instead held that "the better approach is to make such determinations after considering all of the evidence in the record and hearing the parties' arguments thereto . . . . Accordingly, the Court's consideration of the evidence proffered by the parties shall encompass inquiries into authenticity, reliability, and relevance." *Id.* at 6.

The court held that the government had the burden of demonstrating by a preponderance of the evi-

dence that al Odah was lawfully detained. *Id.* at 8. It further held that the President had the authority under the AUMF to detain al Odah if the government established according to that evidentiary standard that he was "part of" the Taliban, al Qaeda, or associated enemy forces. *Id.* at 6-7.

In weighing the evidence, the court found that al Odah had not offered any credible explanation for his trip to Dubai en route to Afghanistan. *Id.* at 8-9. It also found that al Odah's travels through Afghanistan contradicted his other statements that his intention was only to teach in Afghanistan for two weeks. *Id.* at 9. The court also found that al Odah's offered reason for going to Afghanistan lacked credibility because although he claimed he taught at schools in Afghanistan for two weeks, he was unable to provide the names of the places where he taught, the names of any of his fellow teachers, or the names of any of his students. *Id.* at 9-10. The court discussed evidence that the travel route used by al Odah was a common travel route for those going to Afghanistan to join the Taliban. *Id.* at 9-10. It found "that this record supports a reasonable inference that Al Odah may have also been traveling to Afghanistan to engage in jihad, and not to teach the poor and needy for two weeks." *Id.* at 10.

The district court also found that the reasons al Odah offered for not leaving Afghanistan immediately after September 11 lacked credibility and were not consistent with his other statements. *Id.* at 11-12. The court found that al Odah's pattern of staying at houses and his surrendering of his passport were consistent with al Qaeda and Taliban operating procedures. *Id.* at 12. The court recounted the time line

of al Odah's travels, and found that his capture occurred on or around December 18, 2001, *id.* at 12-13, a date that corresponds with the Battle of Tora Bora, which occurred between approximately December 6 and 18, 2001.

The court noted that al Odah's statements failed to account for one month of his time in Afghanistan. *Id.* at 13. It stated that al Odah's explanation for why he was traveling through the Tora Bora mountains was not credible. *Id.* at 13-14. The district court wrote that the "evidence reflects that Al Odah made a conscious choice to ally himself with the Taliban instead of extricating himself from the country." *Id.* at 15. The court found, based on this evidence, that it was "more likely than not that Al Odah became part of the Taliban's forces." *Id.*

The court noted that there was other evidence presented (eyewitness identification of al Odah and [TEXT REDACTED BY THE COURT]), but that it did not need to consider that evidence because it had already found that the Government had presented adequate factual information to meet its burden by a preponderance of the evidence to show that al Odah was "part of" al Qaeda and the Taliban. *Id.* at 15, n. 17.

The court also made an additional finding that the camp that al Odah attended where he engaged in the target shooting with the AK-47 was "more likely than not Al Farouq," a terrorist training camp. *Id.* at 16. The court discussed similarities in geography and operation between the camp al Odah attended and the Al Farouq camp. *Id.* The court noted the fact that there was a trainer at Al Farouq who went by the

name [TEXT REDACTED BY THE COURT], which was very similar to the name of the Taliban official from whom al Odah followed directions for several weeks. *Id.* at 16-17. It also noted similarities between the physical descriptions of the two. *Id.* at 17. The court then concluded

> that the Government has met its burden based on the evidence in the record without specifically identifying that the Taliban-run camp attended by Al Odah was, in fact, Al Farouq. Nevertheless, the Court also finds that it is more likely than not that the camp was Al Farouq, which also makes it more likely than not, when combined with the other evidence in the record, that Al Odah became a part of the forces of the Taliban and al Qaeda.

Id. at 18. On September 8, 2009, al Odah filed a notice of appeal.

II. ANALYSIS

Al Odah challenges the procedure followed by the district court in admitting evidence and the sufficiency of the evidence to support its findings and judgment. Because the procedural issues inform our analysis of the sufficiency questions, we shall address the procedural challenges first.

A. Procedural Challenges

Al Odah makes two procedural challenges. As we noted above, the district court held both that the government had to meet its burden by a preponderance of the evidence and that it would admit hearsay evidence subject to review for reliability. Al Odah ar-

gues that the preponderance of the evidence standard is unconstitutional and that the district court cannot admit hearsay evidence unless it complies with the Federal Rules of Evidence. We review al Odah's challenge to the evidentiary standard de novo because it is a question of law. *See Awad*, 2010 U.S. App. LEXIS 11623 at *23; *Al-Bihani*, 590 F.3d at 870. Our review of the district court's admission of evidence, including its admission of hearsay evidence, is for abuse of discretion. See *United States v. Bailey*, 319 F.3d 514, 517, 355 U.S. App. D.C. 64 (D.C. Cir. 2003); *Morrison v. Int'l Programs Consortium, Inc.*, 253 F.3d 5, 9, 346 U.S. App. D.C. 301 (D.C. Cir. 2001). We can dispatch both of these assignments of error in short order.

Al Odah argues that the government can deprive a person of his liberty only if it meets its evidentiary burden by clear and convincing evidence. But this argument fails under binding precedent in this circuit. It is now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF. *See Awad*, 2010 U.S. App. LEXIS 11623 at *25 ("A preponderance of the evidence standard satisfies constitutional requirements in considering a habeas petition from a detainee held pursuant to the AUMF."); *Al-Bihani*, 590 F.3d at 878 ("Our narrow charge is to determine whether a preponderance standard is unconstitutional. Absent more specific and relevant guidance, we find no indication that it is."); *see also Barhoumi*, 2010 U.S. App. LEXIS 12847 at *16 (holding that under circuit precedent "a preponderance of the evidence standard is constitutional in evaluating

a habeas petition from a detainee held at Guantanamo Bay, Cuba," and that the detainee's argument that "the Government should have been required to establish that [he] is lawfully detained under a standard of at least clear and convincing evidence" is "foreclosed by circuit precedent") (internal quotation marks omitted).

Al Odah's second procedural argument fares no better. He argues that the Federal Rules of Evidence and the habeas corpus statute, 28 U.S.C. § 2241 et seq., restrict the situations in which a district court may admit hearsay evidence in considering a petition from a person detained pursuant to the AUMF. The law is against him. As we quoted above, the Supreme Court in *Hamdi* stated that "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government" in this type of proceeding. 542 U.S. at 533-34. We applied the teachings of *Hamdi* in *Awad*, in which we explicitly held that "[T]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay." 2010 U.S. App. LEXIS 11623 at *15; see also *Barhoumi*, 2010 U.S. App. LEXIS 12847 at *15 (holding that under circuit precedent, "hearsay evidence is admissible in this type of habeas proceeding if the hearsay is reliable") (internal quotation marks omitted); *Al-Bihani*, 590 F.3d at 879 ("[T]he question a habeas court must ask when presented with hearsay is not whether it is admissible . . . but what probative weight to ascribe to whatever indicia of reliability it exhibits.").

Whether a piece of evidence is hearsay is not at issue in this appeal. Rather, we review the decision of the district court as to whether the hearsay is reliable. The government offered reasons why its hearsay evidence had indicia of reliability, and the court considered the reliability of the evidence in deciding the weight to give the hearsay evidence. For example, in considering interrogation reports of a third party concerning al Qaeda and Taliban travel routes into Afghanistan, the court noted that this hearsay was corroborated by "multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad." 648 F. Supp. 2d at 10. The court indicated that it was aware of the limitations of this evidence when it concluded that "[a]lthough far from conclusive, the Government's evidence suggests that an individual using this travel route to reach Kandahar may have done so because it was a route used by some individuals seeking to enter Afghanistan for the purpose of jihad." *Id.* This is exactly the analysis of hearsay which we subsequently approved in *Al-Bihani* and *Awad*. The district court correctly applied the law, and therefore, there was no abuse of its discretion.

Having thus rejected al Odah's two procedural challenges, we proceed to his challenges to the sufficiency of the evidence.

B. Sufficiency of the Evidence

Al Odah argues that the evidence submitted to the district court was insufficient to establish that he was "part of" al Qaeda and Taliban forces. Odah has a heavy burden to meet to have this court reverse the district court's factual findings that are the under-

pinnings of its determination. As we have recently stated in an appeal with an identical procedural context:

> We review a district court's factual findings for clear error, regardless of whether the factual findings were based on live testimony or, as in this case, documentary evidence. *See Anderson v. City of Bessemer*, 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985). "We further note that '[t]his standard applies to the inferences drawn from findings of fact as well as to the findings themselves.'" *Overby v. Nat'l Ass'n of Letter Carriers*, 595 F.3d 1290, 1294 (D.C. Cir. 2010) (quoting *Halberstam v. Welch*, 705 F.2d 472, 486, 227 U.S. App. D.C. 167 (D.C. Cir. 1983) (alteration in *Overby*). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed." *Boca Investerings Partnership v. U.S.*, 314 F.3d 625, 629-30, 354 U.S. App. D.C. 184 (D.C. Cir. 2003) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)). But "[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it . . . Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Overby*, 595 F.3d at 1294 (quoting *City of Bessemer*, 470 U.S. at 573-74) (omission in *Overby*).

Awad, 2010 U.S. App. LEXIS 11623 at *12-*13.

Al Odah makes several challenges to individual pieces of evidence. In considering these challenges to the individual pieces of evidence, we must keep in mind that the purpose of our inquiry is to determine whether, overall, the district court's finding was supported by sufficient evidence. *See Awad*, 2010 U.S. App. LEXIS 11623 at *13 ("We will begin with Awad's challenges to the individual items of evidence. In evaluating these challenges, we do not weigh each piece of evidence in isolation, but consider all of the evidence taken as a whole.").

Al Odah argues that the district court made several errors in not adopting his understanding of the facts and in drawing inferences unfavorable to him from the undisputed evidence. Al Odah defends his following instructions from [TEXT REDACTED BY THE COURT]. He argues that while [TEXT REDACTED BY THE COURT] was a Taliban official, he was a civilian official and not part of the Taliban's military. Al Odah argues that it was reasonable for him, a foreigner in a strange country at a time of war, to seek out and follow the advice of knowledgeable locals. But this argument asks the court to ignore all the other evidence in the case. What matters is not only the formal position [TEXT REDACTED BY THE COURT] of in the Taliban government, but what kind of instructions he gave that al Odah followed. [TEXT REDACTED BY THE COURT] took al Odah to a camp where he trained on a Kalashnikov AK-47 rifle. [TEXT REDACTED BY THE COURT] gave al Odah instructions on where to go after the September 11, 2001 attacks. Al Odah followed [TEXT REDACTED BY THE COURT]'s instructions to go to

a house. At this house, al Odah gave the person in charge of this house his passport and major possessions, which was standard al Qaeda and Taliban operating procedures. [TEXT REDACTED BY THE COURT] gave al Odah instructions on where to receive weapons training, where to go after the September 11 terrorist attacks, where he could stay for free, and introduced him to people from whom he acquired an AK-47. For several months, al Odah followed instructions of a military nature from a member of the Taliban. We uphold the district court's rejection of al Odah's attempt to put an innocuous gloss over these undisputed facts.

Al Odah also argues that it was not nefarious for him to carry a rifle while in Afghanistan. Al Odah argues that rifles were common in Afghanistan, and that he carried the AK-47 for self defense. Again, al Odah is asking this court to examine this single piece of evidence in isolation. Al Odah did not simply possess a weapon. Rather, the evidence shows that [TEXT REDACTED BY THE COURT], a Taliban official, took al Odah to a Taliban-run camp to train on an AK-47 rifle. [TEXT REDACTED BY THE COURT] then provided al Odah a recommendation to find a person, who subsequently introduced him to another person who gave al Odah the same type of AK-47 rifle as that on which he trained. Al Odah then carried this rifle for days during an armed march through the Tora Bora mountains, a march during which al Odah and his fellow travelers were attacked by US and allied warplanes.

Al Odah argues that the district court was also in error to fault him for not leaving Afghanistan immediately after September 11, 2001, and that the dis-

trict court failed to consider that he was stuck in a foreign country trying to do the best he could in a chaotic situation. But the district court considered exactly that. It considered, and rejected, al Odah's argument that he chose what he thought was the quickest way to leave the country. It found that when al Odah had a choice to head out of the country or to stay, he consistently chose to remain in Afghanistan following directions of a member of the Taliban.

Al Odah further argues that there are benign reasons why someone would not travel with his passport while in Afghanistan. Perhaps there may be valid reasons for such behavior, but the district court considered this fact in the context of all the evidence in the case and found it to be incriminating. It was not clear error for the district court to do so.

We have considered, and rejected, al Odah's challenges to the individual pieces of evidence. The only remaining question is whether all the evidence before the district court was sufficient to support its finding that al Odah was "part of" the Taliban and al Qaeda forces. To simply recite the evidence and the inferences the district court drew therefrom is to answer the question in the affirmative regardless of the standard of review we use. *See Awad*, 2010 U.S. App. LEXIS 11623 at *23 ("Determining whether Awad is 'part of' al Qaeda is a mixed question of law and fact. Whether our review of the district court's finding on this question is de novo or for clear error does not matter in this case because the evidence is so strong.").

Al Odah traveled to Afghanistan on a series of one-way plane tickets purchased with cash in a manner consistent with travel patterns of those going to Afghanistan to join the Taliban and al Qaeda. Once in Afghanistan, al Odah sought out a Taliban official. This Taliban official led al Odah for a month doing we know not what, but culminated in the Taliban official taking al Odah to a Taliban-run camp to train on an AK-47 rifle. After the September 11, 2001, terrorist attacks, [TEXT REDACTED BY THE COURT] told al Odah where he should go and who he should seek out to help him. Al Odah did what [TEXT REDACTED BY THE COURT] recommended to him. He gave up his passport and other possessions, and obtained an AK-47 rifle, as he stayed with several individuals over several months. He then went on a march through the Tora Bora region for ten days with 150 men, some of whom, including al Odah, were armed. This march was attacked by US and allied warplanes.

Al Odah attempts to rebut the government's case only by presenting a gloss of innocent activity over several of the undisputed facts. The district court considered all the evidence, rejected al Odah's explanation of the evidence, and held that al Odah was "part of" al Qaeda and Taliban forces. There was no error in this finding, under either a de novo or clear error standard of review.

The district court had before it further evidence that supported the correctness of its conclusion. The district court did not need to rely upon this further evidence because of the weight of the other evidence, but it mentioned the existence of the evidence, and we note it to emphasize that it is further support for

the district court's finding. [TEXT REDACTED BY THE COURT] His passport, which he had surrendered to [TEXT REDACTED BY THE COURT], was discovered in an al Qaeda safehouse. Two other individuals have identified al Odah as a Taliban and al Qaeda member. All this evidence is above and beyond what is necessary for us to affirm the district court's conclusion that al Odah was "part of" al Qaeda and Taliban forces.

The district court's alternative basis for finding that al Odah was "part of" al Qaeda and Taliban forces was that he trained at the Al Farouq training camp. Al Odah raises several challenges to the factual findings underlying this conclusion by the district court. But as we have upheld the district court's finding that al Odah was "part of" al Qaeda and the Taliban by his activities in Afghanistan separate from the allegations that the camp he attended was Al Farouq, we do not need to consider this issue. Once the government has established by a preponderance of the evidence that al Odah was "part of" al Qaeda and Taliban forces, the requirements of the AUMF are satisfied and the government has authority to detain al Odah.

III. CONCLUSION

The law of this circuit is that a preponderance of the evidence standard is constitutional in considering a habeas petition from an alien detained pursuant to authority granted by the AUMF. *Awad*, 2010 U.S. App. LEXIS 11623 at *25. Decisions of this court and of the Supreme Court have established that in this type of habeas proceeding, hearsay evidence is admissible if it is reliable. In our review of

the record, we see strong support for the district court's finding that al Odah was "part of" al Qaeda and Taliban forces in the fall of 2001. Accordingly, we affirm the district court's denial of al Odah's petition for a writ of habeas corpus.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Decided Aug. 24, 2009 Filed Aug. 31, 2009

Civil Action No. 02-828 (CKK)

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

CLASSIFIED MEMORANDUM OPINION

Petitioner Fawzi Khalid Abdullah Fahad Al Odah ("Al Odah") has been detained by the United States Government at the Guantanamo Bay Naval Base in Cuba since 2002. He admits that he traveled to Afghanistan in August 2001 and requested to meet with a Taliban official upon his arrival; that this same Taliban official brought him to a Taliban-operated camp near Kandahar, Afghanistan; that he took one day of training with an AK-47 rifle at this camp; that the Taliban official sent him to stay with an associate in Logar, Afghanistan, after September 11, 2001; that he surrendered his passport and other possessions to this individual; that he met with individuals who were armed and appeared to be fighters;

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that he accepted an AK-47 from these individuals; and that he traveled with his AK-47 into the Tora Bora mountains, remained in the Tora Bora mountains during the Battle of Tora Bora, and was captured shortly thereafter by border guards while still carrying his AK-47. Based on these admissions and other evidence in the record, most of which is undisputed, the Government asserts that it has the authority to detain Al Odah pursuant to the Authorization for the Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) ("AUMF"), which authorizes the use of force against certain terrorist nations, organizations, and persons. Al Odah believes he is unlawfully detained and has filed a petition for a writ of habeas corpus.

This civil proceeding requires the Court to determine whether or not Al Odah's detention is lawful. In connection with this inquiry, the Court has considered the factual evidence in the record, the extensive legal briefing submitted by the parties, and the arguments presented during a three-day Merits Hearing held on August 11-13, 2009.[1] The parties did

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[1] The Court notes several developments pertaining to the factual record since the completion of the Merits Hearing in this case. First, the Government withdrew Exhibit 157D and submitted in its place a version that redacted a small amount of information that is not relevant to this case. See Gov't's Notice at 1 (Aug. 17, 2009). Second, the Court denied a motion filed by Al Odah to supplement the record with an opinion issued in Al Adahi v. Ohama, because decisions by other judges of this Court are not evidence and the proper method for notifying the Court of new legal authority is through a Notice. See Min. Order dated Aug. 20, 2009. Third, the Court granted an unopposed motion by the Government to supplement the record with evi-

(footnote cont'd)

not present any live testimony at the Merits Hearing, but Al Odah did listen telephonically to the unclassified opening statements by his counsel and the Government's counsel. Based on the foregoing, the Court finds that the Government has met its burden to show by a preponderance of the evidence that Al Odah became part of Taliban and al Qaeda forces. Accordingly, the Court shall DENY Al Odah's petition for habeas corpus.

I. BACKGROUND

A. Procedural History

Al Odah filed his petition for habeas corpus on May 1, 2002, making this case the oldest of the pending Guantanamo Bay habeas cases. After several years of litigation, this case was stayed pending resolution of whether the Court had jurisdiction to hear Al Odah's petition. On June 12, 2008, the United States Supreme Court issued its decision in *Boumediene v. Bush*, clarifying that this Court had jurisdiction to consider the petition and advising this and the other judges in this District that "[t]he detainees are entitled to [] prompt habeas corpus hearing[s]." 553 U.S. __, 128 S. Ct. 2229, 2275, 171 L. Ed. 2d 41 (2008).

Following the *Boumediene* decision, this and most of the other judges in this District agreed to consolidate their Guantanamo Bay habeas cases before former Chief Judge Thomas F. Hogan for issuance of

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dence associated with Al Odah's passport, which the Government submitted in response to a question the Court had asked during the Merits Hearing. See Min. Order dated Aug. 21, 2009.

an initial case management order that would expeditiously move these cases toward resolution. Judge Hogan issued a Case Management Order on November 6, 2008, which he amended on December 16, 2008, and which the Court adopted in this case on December 22, 2008. The Court has relied on the Amended Case Management Order as the backdrop for its subsequent Scheduling Orders in this case.[2]

The Government filed an Amended Factual Return on September 8, 2008, and pursuant to the schedule set by the Court, Al Odah filed a Traverse on March 30, 2009. The parties engaged in extensive discovery and motions practice in the interim. Al Odah filed a Motion for Additional Discovery on January 26, 2009, which the Court granted-in-part and denied-in-part on February 12, 2009, after a hearing on February 11, 2009. Al Odah filed a Motion to Produce a Declassified Factual Return on January 9, 2009, which the Government produced on February 6, 2009. The Court also required the Government to provide Al Odah with certain discovery from the Guantanamo Bay Joint Task Force database. Additionally, the parties filed six pre-hearing motions, most of which sought rulings concerning the admissibility of particular evidence. By Order dated June 16, 2009, the Court granted the parties' motions to rely on hearsay evidence at Al Odah's Merits Hear-

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[2] The Court extends its gratitude to Judge Hogan for his considerable investment of time and energy to produce the Case Management Order.

ing, but held their other evidentiary motions in abeyance.[3]

To narrow the disputed issues presented at the Merits Hearing and to focus the parties on the specific documents underpinning their respective arguments, the Court ordered the Government to file a Statement of Facts on which they intended to rely at the Merits Hearing (which narrowed the allegations presented in the Amended Factual Return), and instructed both parties to submit Witness and Exhibit Lists. The Court advised the parties that it would likely exclude from consideration any evidence at the Merits Hearing that had not been identified in the Witness and Exhibits Lists by August 3, 2009 (approximately one week prior to the scheduled Merits Hearing).[4] The parties timely submitted these materials and the Court held a three-day Merits Hearing on August 11-13, 2009.

B. Evidentiary Approach

As stated above, the Court granted the parties' motions to rely on hearsay evidence in this proceeding. The plurality in *Hamdi v. Rumsfeld* specifically acknowledged that "[h]earsay ... may need to be accepted as the most reliable available evidence from the Government." 542 U.S. 507, 534, 124 S. Ct. 2633,

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[3] Al Odah also filed a Motion for Sanctions against the Government for failing to timely disclose exculpatory evidence. The Court does not find that sanctions are warranted on the present record.

[4] The Court noted two exceptions for (1) documents offered for rebuttal purposes, and (2) exculpatory documents, as to which the Government has a continuing obligation to disclose.

159 L. Ed. 2d 578 (2004). The Court finds that allowing the use of hearsay by both parties balances the need to prevent the substantial diversion of military and intelligence resources during a time of hostilities, while at the same time providing Al Odah with a meaningful opportunity to contest the basis of his detention. The Court is fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable, and it shall make such determinations in the context of the evidence and arguments presented during the Merits Hearing -- including any arguments the parties have made concerning the unreliability of hearsay evidence. *Cf Parhat v. Gates*, 532 F.3d 834, 849, 382 U.S. App. D.C. 233 (D.C. Cir. 2008) (explaining, in the context of the Detainee Treatment Act, that the Court was "not suggest[ing] that hearsay evidence is never reliable -- only that it must be presented in the form, or with sufficient additional information, that permits [the finder of fact] to assess its reliability") (emphasis in original).

For similar reasons, the Court shall deny the Government's motion to have its evidence admitted with a presumption of accuracy and authenticity. Relying in part on the Supreme Court's statement in *Hamdi v. Rumsfeld* that "the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided," 542 U.S. at 534, the Government argues that a presumption as to its evidence is both appropriate and necessary. The Court disagrees. One of the central functions of the Court in this case is "to evaluate the raw evidence" proffered by the Government and to determine whether it is

"sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of clarity." *Parhat*, 532 F.3d at 847. Simply assuming the Government's evidence is accurate and authentic does not aid that inquiry. *Cf Ahmed v. Obama*, 613 F. Supp. 2d 51, 55 (D.D.C. 2009) (rejecting a presumption of accuracy for the Government's evidence and holding that "the accuracy of much of the factual material contained in [the Government's] exhibits is hotly contested for a host of different reasons ...").

The Court also finds that there are significant reasons why the Government's proffered evidence may not be accurate or authentic. Some of the evidence advanced by the Government has been "buried under the rubble of war," *Hamdi*, 542 U.S. at 532, in circumstances that have not allowed the Government to ascertain its chain of custody, nor in many instances even to produce information about the origins of the evidence. Other evidence is based on so-called "unfinished" intelligence, information that has not been subject to each of the five steps in the intelligence cycle (planning, collection, processing, analysis and production, and dissemination). Based on the Government's own declarations, its raw intelligence may not have been fully analyzed for its "reliability, validity, and relevance" in the context of other intelligence where "judgments about its collective meaning" are made. Ex. 1 at 5 (9/19/08 Decl, of [TEXT REDACTED BY THE COURT] Ex. 1-A at 1-2 (5/29/09 Decl. of [TEXT REDACTED BY THE COURT] (explaining that the five steps in the intelligence cycle are not "mechanical" and that the process "var[ies] by collection specialty," but not disturbing

the conclusion that "unfinished" intelligence has not undergone the same rigorous integration and evaluation process that produces "finished" intelligence).[5] Still other evidence is based on multiple layers of hearsay (which inherently raises questions about reliability), or is based on reports of interrogations (often conducted through a translator) where translation or transcription mistakes may occur. In this case, for example, the Government argues that interrogators and/or interpreters included incorrect dates in three separate reports that were submitted into evidence based on misunderstandings between the Gregorian and the Hijri calendars. See Ex. 24 at 1 [TEXT REDACTED BY THE COURT] (Unclassified Summary of Admin. Review Board for [TEXT REDACTED BY THE COURT]) (same). The Government never attempted to show during the Merits Hearing that these reports were ever corrected. Accordingly, the Court shall not accord a presumption of accuracy or authenticity to the Government's evidence, but shall consider the accuracy or authenticity of the evidence in the context of the entire record and the arguments raised by the parties.

Finally, the Court shall use the same approach to consider Al Odah's pre-hearing evidentiary motions that sought to exclude particular pieces of evidence prior to the Merits Hearing based on their alleged lack of authenticity, reliability, or relevance. Rather than exclude evidence from consideration ex ante by examining it in a vacuum, the Court concludes that

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[5] All citations to exhibits (cited as "Ex.") refer to the parties' joint exhibits submitted at the Merits Hearing.

the better approach is to make such determinations after considering all of the evidence in the record and hearing the parties' arguments related thereto. The Court believes this approach is particularly useful where, as here, a document viewed in isolation may appear to be irrelevant, but when considered in the context of the other evidence in the record its importance may become clear. Accordingly, the Court's consideration of the evidence proffered by the parties shall encompass inquiries into authenticity, reliability, and relevance. *Cf. Parhat*, 532 F.3d at 847 (describing the Court's inquiry into whether evidence is "'sufficiently reliable and sufficiently probative to demonstrate the truth of the asserted proposition with the requisite degree of certainty'") (quoting *Concrete Pipe & Prods., Inc v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 124 L. Ed. 2d 539 (1993)).

C. Standard of Detention

As Judge Reggie B. Walton accurately observed in a thoughtful opinion considering the Government's detention authority, "the state of the law regarding the scope of the President's authority to detain petitioners remains unsettled," *Gherebi v. Obama*, 609 F. Supp. 2d 43, 45 (D.D.C. 2009), even though habeas petitions by individuals such as Al Odah have been pending for over seven years. Guidance in this area is limited because the Supreme Court acknowledged but did not clarify the uncertain "permissible bounds" of the Government's detention authority, *see Hamdi*, 542 U.S. at 552 n.l, and the D.C. Circuit has not had occasion to address the issue. Fortunately, several judges in this District have considered the

scope of the Government's detention authority and have issued well-reasoned opinions on the subject. *See, e.g., Gherebi*, 609 F. Supp. 2d at 43; *Hamlily v. Ohama*, 616 F. Supp. 2d 63 (D.D.C. 2009); *Mattan v. Obama*, 618 F. Supp. 2d 24 (D.D.C. 2009).

Taking advantage of these prior decisions, the Court shall adopt the reasoning set forth in Judge John D. Bates's decision in *Hamlily v. Ohama*, and shall partially adopt the Government's proposed definition of its detention authority.[6] The Court agrees that the President has the authority to detain individuals who are "part of the Taliban, al Qaeda, or associated enemy forces, but rejects the Government's definition insofar as it asserts the authority to detain individuals who only "substantially supported" enemy forces or who have "directly supported hostilities" in aid of enemy forces. While evidence of such support is undoubtedly probative of whether an individual is part of an enemy force, it may not by itself provide the grounds for detention. Accordingly, the

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[6] The Government's proposed definition for its detention authority is found in the Memorandwn that it submitted in this case on March 13, 2009. According to the Government,

[t]he President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of, or substantially supported, Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act, or has directly supported hostilities, in aid of such enemy armed forces.

Court shall consider whether Al Odah is lawfully detained in the context of the following standard:

> The President has the authority to detain persons that the President determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harbored those responsible for those attacks. The President also has the authority to detain persons who were part of Taliban or al-Qaida forces or associated forces that are engaged in hostilities against the United States or its coalition partners, including any person who has committed a belligerent act in aid of such enemy armed forces.[7]

In the context of this definition, the "key inquiry" for determining whether an individual has become "part of one or more of these organizations is "whether the individual functions or participates within or under the command structure of the organization -- i.e., whether he receives and executes orders or directions." *Hamlily*, 616 F. Supp. 2d at 75.

D. Burden of Persuasion

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[7] Al Odah submitted a response to the Government's proposed detention standard seeking to have the Court limit the types of organizations that may be considered an "associated force" or "enemy armed force." See Pet'r's Resp. at 2-11. The Court declines to engage in a hypothetical inquiry concerning the types of organizations that may or may not fall within this definition, but shall instead examine the facts of each case and shall further define these terms in context if appropriate and necessary.

Pursuant to the Amended Case Management Order that the Court adopted in this case on December 22, 2008, the Government bears the burden of proving by a preponderance of the evidence that Al Odah is lawfully detained. *See In re Guantanamo Bay Detainee Litig.*, Misc. No. 08-442, 2008 U.S. Dist. LEXIS 97095, CMO § II.A (Nov. 6, 2008) ("[t]he government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful") (citing *Boumediene*, 128 S. Ct. at 2271) ("[T]he extent of the showing required of the government in these cases is a matter to be determined."). Accordingly, Al Odah need not prove his innocence nor testify on his own behalf. The Court has drawn no inference based on Al Odah's decision not to testify or submit a declaration in this case. *Accord Awad v. Obama*, Civ. A. No. 05-2379, Classified Slip Op. at 7 (D.D.C. Aug. 12, 2009). The Government must come forward with evidence demonstrating by a preponderance of the evidence that he is lawfully detained, and if the Government fails to meet this burden, the Court must grant Al Odah's petition for habeas corpus.

II. DISCUSSION

The Government's theory of detention is that Al Odah more likely than not became part of Taliban and al Qaeda forces in Afghanistan. The Court shall evaluate the record evidence associated with this theory in three steps. First, the Court shall discuss the circumstances surrounding Al Odah's trip from Kuwait to Afghanistan in August 2001. Second, the Court shall discuss Al Odah's subsequent travels and activities within Afghanistan until the time of his

capture with an AK-47 while near the Tora Bora mountains in December 2001. Although the Court finds that the evidence in the first two categories is by itself sufficient for the Government to meet its burden in this case, the Court shall also discuss a third category of evidence establishing that the Taliban-run camp that Al Odah admits to visiting in Kandahar, Afghanistan, is more likely than not Al Farouq, al Qaeda's primary Afghan basic training facility.

A. Al Odah's Travel to Afghanistan

The evidence related to events prior to 2001 is undisputed. Al Odah was born in Kuwait City, Kuwait, in 1977. Ex. 40 (Al Odah Civil ID Card). He received a degree in Islamic studies from Kuwait University in 1998. Ex. 13 at 1 (6/9/03 Interrogation of Al Odah); Ex. 101 PP 1-3 (2/22/09 Decl. of [TEXT REDACTED BY THE COURT] Following graduation, Al Odah worked for [TEXT REDACTED BY THE COURT] Ex.9 at 1-2 [TEXT REDACTED BY THE COURT] Al Odah then [TEXT REDACTED BY THE COURT] *Id.* at 2. Prior to 2001, Al Odah frequently traveled to neighboring Saudi Arabia to visit holy places or vacation with his family, [TEXT REDACTED BY THE COURT] and traveled to Pakistan in April and May 2000 to teach along the border of Afghanistan and Pakistan. Ex. 9 at 1; Ex. 10 at 1 (Al Odah Travel Activity); Ex. 99 PP 3, 6 (2/22/09 Decl. of Khalid al Odah).

In August 2001, Al Odah decided to travel to Afghanistan. According to Al Odah, he decided to make this trip because his grandmother had given him money to do so, and because he believed the Afghan

people "would be very receptive to his teachings." Ex. 13 at 1 (6/9/03 Interrogation of Al Odah). He took three weeks of leave from work, Ex. 14 at 1 (6/21/03 Interrogation of Al Odah), and he planned to teach poor or needy people for two weeks. Ex. 16 at 7 (Al Odah's Unclassified CSRT Testimony) ("During my official summer break, I left for Afghanistan for two weeks").[8]

Al Odah began his journey to Afghanistan on [TEXT REDACTED BY THE COURT] Ex. 9 at 3; Ex. 106, Attach. B at 1 (Al Odah Travel Arrival and Departure Information). Al Odah's trip to Dubai raises immediate questions about the reasons for his travel to Afghanistan. [TEXT REDACTED BY THE COURT] Ex. 9 at 3. [TEXT REDACTED BY THE COURT] *Id.* When asked how long he remained in Dubai, Al Odah initially said that he remained there for one week, Ex. 33 (Dec. 2001 Interrogation of Al Odah), [TEXT REDACTED BY THE COURT] Ex. 9 at 3. These statements are demonstrably false. Al Odah's undisputed travel records submitted into evidence establish that Al Odah arrived in Dubai on August 13, 2001, bought a one-way ticket to Karachi, Pakistan, and left on a flight to Karachi on August 14, 2001. Ex. 106, Attach. B at 1 (leaving Kuwait on

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[8] The Court located one instance in the record where [TEXT REDACTED BY THE COURT] Ex. 9 at 3. This statement conflicts with his other statements, including his sworn testimony at an administrative review board proceeding, about intending to teach for two weeks and taking leave from work for three weeks. During the Merits Hearing, Al Odah's counsel did not dispute that Al Odah intended to travel to Afghanistan for only two or three weeks.

August 13, 2001), Ex. 9 at 3 [TEXT REDACTED BY THE COURT] Ex. 10 at 1 (arriving in Karachi on August 14, 2001). Accordingly, Al Odah only stayed in Dubai overnight despite his statements that he remained there for at least [TEXT REDACTED BY THE COURT] and as much as a week [TEXT REDACTED BY THE COURT].[9]

During the Merits Hearing, Al Odah's counsel did not directly address Al Odah's statements about Dubai, but emphasized that a stop in Dubai could be understood as one part of a direct route to Afghanistan from Kuwait. 8/14/01 Merits Hearing Tr. at 4 ("I [am] simply making the point that if you look at a map... the route from Kuwait, Dubai, Karachi, Quetta is a pretty direct route"). Nowhere in the record, however, did Al Odah ever explain that he bought a one-way ticket to Dubai because he believed it was the most direct route to Afghanistan, as his counsel conceded. *Id.* ("I'm not basing [this explanation] on something he said"). Accordingly, Al Odah has not offered any credible explanation based on the evidence in the record that would explain his trip to Dubai en route to Afghanistan.

[TEXT REDACTED BY THE COURT] Ex. 9 at 3. [TEXT REDACTED BY THE COURT] *Id.* at 4. Al Odah visited a mosque in Spin Buldak where he asked to meet someone affiliated with the Taliban "to assist him in traveling to places to teach in Afghanis-

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[9] Because Al Odah's trip to Dubai would only have been the second foreign trip he would have taken by himself, it is unlikely that Al Odah would have simply forgotten how long he remained there.

tan." Ex. 14 at 1. [TEXT REDACTED BY THE COURT] Ex. 9 at 4; Ex. 16 at 2. [TEXT REDACTED BY THE COURT] Ex. 9 at 4. [TEXT REDACTED BY THE COURT] *Id.* [TEXT REDACTED BY THE COURT] Ex. 9 at 4.

Al Odah's decision to accompany [TEXT REDACTED BY THE COURT] to Kandahar on September 10, 2001, directly contradicts Al Odah's statements that he intended to teach in Afghanistan for two weeks. By the time he traveled to Kandahar, Al Odah would have already taught in Spin Buldak for two weeks, and when combined with his journey to get to Spin Buldak, he would have already exceeded the three weeks of leave he requested from his employer. When considered in the context of Al Odah's inability to describe any details associated with his teaching activities in Spin Buldak, the Court concludes that Al Odah's statements concerning the circumstances of his activities upon arriving in Afghanistan lack credibility.

Seeking to fill the void created by Al Odah's lack of credible statements, the Government submitted evidence that Al Odah traveled to Afghanistan seeking to join the Taliban in its fight against the Northern Alliance. In addition to relying on Al Odah's admissions that he immediately requested to meet with a Taliban official once crossing the border, as well as Al Odah's subsequent transportation through the country at the direction of this Taliban official, the Government submitted evidence that the route traveled by Al Odah - Dubai, Karachi, Quetta, Spin Buldak, and Kandahar -- was a route followed by

some individuals who were seeking to enter Afghanistan for purposes of jihad.

The Government submitted the interrogation report of Mukhtar al Warafi, a Yemini who admitted that he traveled to Afghanistan in August 2001 to train and fight with the Taliban. Ex. 61 at 1-2 (5/20/02 Interrogation of Mukhtar al Warafi). Al Warafi explained that he heard two Fatwas read at the Jamal Al Din Mosque in August 2001 about traveling to Afghanistan and helping the Taliban fight against the Northern Alliance. *Id.* at 2. One of the Fatwas identified the route for individuals to follow to arrive at Quetta, Pakistan, where they would be taken to a large "Taliban center." *Id.* In response to these Fatwas, al Warafi traveled to Afghanistan in August 2001, stopping first in Dubai, then Karachi, Quetta, Spin Buldak, and finally Kandahar - the same route traveled by Al Odah in the same time period. *Id.* The Government submitted multiple other examples of individuals who used this route to travel to Afghanistan for the purpose of jihad. *See, e.g.*, Ex. 68 at 1 [TEXT REDACTED BY THE COURT], [TEXT REDACTED BY THE COURT] Ex. 80 at[TEXT REDACTED BY THE COURT].[10] Although far from

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[10] One of the individuals identified by the Government as using the same path of travel as Al Odah was Mohammed al Adahi, an individual whose petition of habeas corpus was recently granted. *See Adahi v. Obama*, Civ. A. No. 05-280, Classified Slip. Op. (Aug. 17, 2009). In her Opinion, Judge Gladys Kessler identified the same travel pattern [TEXT REDACTED BY THE COURT] which was facilitated in that case by an individual affiliated with al Qaeda, but she reached no specific conclusions about the travel pattern. *Id.* at 16-17.

conclusive, the Government's evidence suggests that an individual using this travel route to reach Kandahar may have done so because it was a route used by some individuals seeking to enter Afghanistan for purposes of jihad.[11]

The foregoing discussion supports three conclusions. First, Al Odah has admitted that he sought to contact a Taliban official upon reaching Afghanistan and that he subsequently moved around the country at the direction of this official. Second, Al Odah's statements concerning his travel route to Afghanistan and his activities after arriving in Afghanistan are not credible. Third, there is evidence to suggest that some individuals who traveled to Afghanistan using the same route as Al Odah did so because they were entering Afghanistan to engage in jihad. The Court finds that this record supports a reasonable inference that Al Odah may have also been traveling to Afghanistan to engage in jihad, and not to teach the poor and needy for two weeks. While this inference standing alone is insufficient to find that Al Odah did, in fact, become "part of the forces of the Taliban or al Qaeda, the Court finds that this evi-

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[11] Al Odah's counsel argued at the Merits Hearing that this evidence constitutes "guilt by association." The Court disagrees. Evidence of why other individuals traveled along the same route as Al Odah is appropriately considered in the context of Al Odah's admissions and his failure to offer a credible explanation for his travel route. The evidence is not aimed at determining guilt or innocence -- rather, it is probative of why Al Odah may have used this route in the absence of any other credible explanation supported by record evidence.

dence is probative and shall be considered in the context of the other record evidence.

B. Al Odah's Travel and Activities in Afghanistan

[TEXT REDACTED BY THE COURT][12] Ex. 13 at 1; Ex. 9 at 4. Al Odah admitted that this camp was supervised by the Taliban and that he took one day of training on an AK-47 rifle, Ex. 16 at 2, but denied that it was a "training camp" and in later statements characterized it as a camp for children:

[TEXT REDACTED BY THE COURT]

Ex. 9 at 4.

> June 9, 2003 interrogation: At this camp where [Al Odah] spent one day, he taught the Koran and also shot AK-47 rifles with the children in the camp ... [Al Odah] stated that is [sic] was common to shoot rifles during this type of training. [Al Odah] described the camp as being similar to a boy scout camp. The camp was run by a Sheik, whose name [Al Odah] could not remember.

Ex. 13 at 1.

> September 11, 2004 testimony before Administrative Review Board: [I]t was not a training camp. It was just a place for learning for people age twelve to fourteen years old. It was being looked after or supervised by the Taliban ... The only thing that was taught there was shooting or aiming at targets.

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[12] [TEXT REDACTED BY THE COURT] Ex. 6 at 4.

> That was the training that they had. In Afghanistan, shooting a Kalashnikov is just like throwing stones. It is very common. When I went through the training with the Kalashnikov, it was just out of my wanting to learn how to shoot a Kalashnikov.

Ex. 16 at 2.

Al Odah was at this camp or in the Kandahar area when the September 11, 2001 attacks occurred. [TEXT REDACTED BY THE COURT] advised Al Odah that Kandahar would likely be attacked by the United States. Ex. 14 at 1 ("[Al Odah] stated that [TEXT REDACTED BY THE COURT] spoke about the September 11, 2001 [] attacks on the United States and how he feared the Americans might attack Kandahar. [TEXT REDACTED BY THE COURT] was uncomfortable about the possibility of this"). [TEXT REDACTED BY THE COURT][13] Ex. 13 at 1; Ex. 9 at 4. [TEXT REDACTED BY THE COURT]

Al Odah's decision not to leave Afghanistan after September 11, 2001, is itself a significant fact in this case. Al Odah's counsel during the Merits Hearing repeatedly emphasized that Al Odah only wanted to leave Afghanistan at this point but that he did not know how to safely exit the country. At first blush, this argument appears to find support in the record. For example, Al Odah stated that "it was very dangerous for an Arab to be in Afghanistan" because "Afghans that were against the Taliban were looking

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[13] [TEXT REDACTED BY THE COURT]

for Arabs to turn over to the Americans." Ex. 13 at 1-2. See also Ex. 124 (Leaflet dropped in Afghanistan by American or coalition forces indicating that Afghans would receive money for capturing Taliban leaders). Al Odah also stated that he "realized he would have problems and sought to leave but could not. He heard that the Afghans had closed the border." Ex. 33.

After considering Al Odah's explanation in the context of the entire record, however, the Court finds that it lacks credibility for at least two reasons. First, Al Odah was repeatedly questioned about this explanation during an administrative review board proceeding, and his sworn testimony suggests that, far from wanting to leave the country at that point, Al Odah was seeking to avoid detection:

> Tribunal Member: . . . You initially went only for two weeks at the end of August. The September 11th attacks took place at the end of those two weeks. There were no US attacks or coalition attacks right after September 11th. Why would you have not left at the normal time?
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> Detainee: I had a visa for Pakistan. If I would have tried to go back, they would have questioned me as to why I was in Afghanistan. It would have been difficult for me. It would have been complicated. I was afraid of being accused of anything I might not have done.
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> * * *
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> Tribunal Member: So, at the two-week portion, right at the very end of when you were origi-

nally scheduled to go back, it was too dangerous to leave the country at that point?

Detainee: If I would have gone back to my country at that time, it would have been great embarrassment, or people would have looked at me strangely. I was just coming from Afghanistan and the United States had just accused Afghanistan, so it would have looked bad. I was afraid of the Kuwaiti authorities who would have obviously questioned me.

Ex. 16 at 9, 12. Thus, the explanation offered by Al Odah's counsel that he wanted to leave Afghanistan after September 11, 2001, is undermined by Al Odah's sworn statements in the record indicating that he wanted to stay and avoid detection.

Second, Al Odah's argument that he wanted to leave Afghanistan after September 11, 2001, is undermined by the geography of Afghanistan. [TEXT REDACTED BY THE COURT] Ex. 9 at 4. There is a road that links Kandahar to Quetta, over a distance of approximately 124 miles. 8/11/09 Merits Hearing Tr. at 45. Al Odah would have just traveled on this road to reach Kandahar. Rather than returning to Pakistan using the road that he had just used, Al Odah instead followed [TEXT REDACTED BY THE COURT] instructions and headed away from the border of Pakistan toward Kabul, traveling approximately 350 miles north. *Id.* According to Al Odah, he still would have had his Kuwaiti passport and a visa for Pakistan at that point (albeit not a visa from Afghanistan). There is no logical reason why, if Al Odah wanted to leave Afghanistan, he would not have traveled back toward Quetta instead of moving

deeper into country and toward the conflict that he allegedly wanted to avoid. Accordingly, the Court does not credit Al Odah's explanation that his travels and activities after September 11, 2001, were motivated by his desire to leave Afghanistan.[14]

As described above, [TEXT REDACTED BY THE COURT] Ex. 9 at 4. [TEXT REDACTED BY THE COURT] Ex. 9 at 4. [TEXT REDACTED BY THE COURT] *Id.* at 5. While Al Odah explained that he left his possessions with [TEXT REDACTED BY THE COURT] to avoid being viewed as an Arab and that he planned to have [TEXT REDACTED BY THE COURT] send the items to him once he reached safety in Pakistan, Al Odah subsequently explained that he lost [TEXT REDACTED BY THE COURT] address and that he could not remember any part of it. Ex. 13 at 2.

The Government introduced undisputed evidence that al Qaeda followed a standard operating procedure for those entering al Qaida and Taliban-associated guesthouses. Ex. 2 at 3 (9/19/08 Decl. of [TEXT REDACTED BY THE COURT]). According to these procedures, individuals were required to surrender their passports, identification, money, or oth-

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[14] The Court again emphasizes that Al Odah should not have even been in Afghanistan on September 11, 2001, according to his statements about taking three weeks of leave from work and wanting to teach for two weeks. The undisputed evidence in the record reflects that Al Odah left Kuwait on August 13, 2001. Relying on Al Odah's statements, he should have left Afghanistan on August 27, 2001 (two weeks after he left Kuwait), or at the latest September 3, 2001 (three weeks after he left Kuwait).

er travel documents when entering a guesthouse or safe-house, particularly if they were planning to attend a training camp. *Id.*; Ex. 3 at 3 (9/19/08 Decl. of [TEXT REDACTED BY THE COURT]). These procedures allowed administrators to exert control over trainees and prevent them from easily leaving. Ex. 2 at 3. As a consequence, "[m]any detainees were captured without passports or other identification." Ex. 3 at 3. Al Odah's admission that he surrendered his passport to [TEXT REDACTED BY THE COURT] associate is consistent with these standard operating procedures.

[TEXT REDACTED BY THE COURT] Ex. 14 at 2; Ex. 9 at 5. [TEXT REDACTED BY THE COURT] *Id.* Al Odah admitted that these individuals "carried AK-47s and appeared to be fighters." Ex. 14 at 2. Al Odah admitted that [TEXT REDACTED BY THE COURT] offered him an AK-47 rifle, which Al Odah accepted. Ex. 13 at 2. The Government submitted evidence that [TEXT REDACTED BY THE COURT]. Ex. 165 (Intelligence Report); Ex. 166 at 4 (Interrogation of ISN 570).

[TEXT REDACTED BY THE COURT] Ex. 9 at 5. *Id.* Al Odah stated that going through the Tora Bora mountains was "the only way to get from Jalalabad to Pakistan." Ex. 16 at 3. [TEXT REDACTED BY THE COURT] Ex. 9 at 5. American war planes bombed the group, but Al Odah avoided injury. Ex. 13 at 2. [TEXT REDACTED BY THE COURT] Ex. 9 at 5. After about ten days, Al Odah and those with whom he was traveling were captured by Pakistani border guards on or around December 18, 2001. Ex. 29 at 1. The Government presented credible evidence

that one of the persons with whom Al Odah was captured had substantial ties to al Qaeda. Ex. 56 at 1 (1/3/2002 Information Report) (stating that Al Odah was captured with ISN [TEXT REDACTED BY THE COURT]); Ex. 48 at 1 [TEXT REDACTED BY THE COURT] Al Odah still had his AK-47 at the time of his capture.[15] Ex. 29 at 1.

Based on the foregoing narrative, Al Odah's admissions against interest include his travel to Logar at the direction of a Taliban official, the surrender of his passport and other possessions to an individual associated with [TEXT REDACTED BY THE COURT], a member of the Taliban, his meeting with individuals who appeared to be armed fighters, his acceptance of an AK-47 rifle from one of the fighters, his travel into the Tora Bora mountains with armed men toward the armed conflict, where he remained through the Battle of Tora Bora and where he was ultimately captured while carrying his AK-47. The other evidence surrounding these statements include the recovery of Al Odah's passport at a safehouse in Karachi, Pakistan, where someone named was cap-

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[15] [TEXT REDACTED BY THE COURT] Ex. 9 at 5 [TEXT REDACTED BY THE COURT] in later reports he said that he "surrendered." See, e.g., Ex. 16 at 4 ("I was not captured by Pakistani forces. I surrendered."). Although this distinction is semantic, the Court notes that the other evidence in the record corroborates Al Odah's initial characterization of a capture. See, e.g., Ex. 29 at 1 ("had Kalashnikov when captured . . . surrendered weapon to Pakistani forces"); Ex. 56 at 1 ("captured by Pakistani officials"). The Court also notes that Al Odah had numerous opportunities to travel to the border of Pakistan and surrender prior to arming himself and traveling through the field of battle.

tured (the same name as the person who gave Al Odah his AK-47), and the fact that Al Odah was captured along with at least one other individual with ties to al Qaeda. In addition to the foregoing, the Court emphasizes three other aspects of the evidence warranting consideration.

First, Al Odah's statements fail to account for at least one month of his time in Afghanistan following the September 11, 2001 attacks. In particular, Al Odah indicates that [TEXT REDACTED BY THE COURT] Ex. 9 at 5; Ex. 16 at 9. [TEXT REDACTED BY THE COURT] Ex. 9 at 5. [TEXT REDACTED BY THE COURT][16] *Id.* It is undisputed, however, that Al Odah was captured on or around December 18, 2001. Ex. 29 at 1; Ex. 33. Accordingly, Al Odah's statements create an almost two month gap (between October 21, 2001 and December 18, 2001). The necessary inference is that Al Odah remained in a particular location or locations for at least one month longer than he revealed in his statements.

Second, the Government introduced evidence that Al Odah's travel to Jalalabad and then to the Tora Bora mountains matched the movements of Taliban and al Qaeda fighters after the September 11, 2001 attacks. Specifically, Usama bin Laden began to marshal his forces in the vicinity of Jalalabad in mid-November 2001, Ex. 98 at 97 (United States Special Operation Command History of Operation Enduring Freedom in Afghanistan), which is approximately the

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[16] Al Odah stated in one interview that he stayed in Logar for twenty days and not one month, Ex. 14 at 2, but this discrepancy would only create a larger gap in his story.

same time frame that Al Odah fails to have any explanation to account for his location and activities. Shortly thereafter, bin Laden decided to move his forces into the Tora Bora mountains, approximately 25 miles south of Jalalabad, "to make a stand prior to the onset of winter and to defeat American attempts both to capture senior leaders and destroy the organization." *Id.* After as many as 2,000 fighters entered Tora Bora in December 2001, coalition forces infiltrated the area and American warplanes began a bombing campaign that reached its peak between December 11, 2001 to December 17, 2001 (although the battle is considered to have lasted between December 6, 2001 through December 18, 2001). 8/11/09 Merits Hearing Tr. at 51, 53. Significantly, Al Odah admits that he [TEXT REDACTED BY THE COURT] Ex. 9 at 5; Ex. 13 at 2.

Third, Al Odah's explanation that he could only reach Pakistan by traveling through the Tora Bora mountains is not credible. The Government introduced evidence that the shortest and simplest route from Jalalabad to Pakistan was through the famed Kyber pass, 45 miles from Jalalabad. 8/11/09 Merits Hearing Tr. at 59. In contrast, the route through the Tora Bora mountains required a difficult climb into and then through bitterly cold mountains where al Qaeda and Taliban fighters were making their stand against coalition forces. *Id.* During the Merits Hearing, the Court asked Al Odah's counsel why Al Odah would choose to travel into the Tora Bora mountains instead of the traveling through the Kyber pass:

> THE COURT: Is your position [] that it would have been more dangerous to have been an

> Arab on what looks like a much simpler route [the Kyber pass] than to go towards the area where you have Taliban and al-Qaeda where they're likely to be attacked by the northern alliance or somebody else?

Id. at 66. Ultimately, Al Odah's counsel supplied the following answer:

> COUNSEL: [I]t [was] rational to try to stay in places where the government still controls rather than going to places where the government no longer controls. And that's basically what the evidence shows ... it's simply not surprising or incriminating that Mr. Al Odah or any other refugee would try to remain in places where the Afghani government, the *de facto* Afghani government, the Taliban, controlled. The [Government's evidence] showed that there are routes through the Tora Bora mountains into Pakistan, [and] that the Taliban was still in control of portions of the Tora Bora mountains.

Id. at 79-80. This exchange encapsulates one of the most significant problems with Al Odah's arguments in this case -- Al Odah unquestionably had choices. A review of the evidence demonstrates that he consciously chose to move through Afghanistan at the direction of Taliban officials and to remain in Taliban-controlled territories (despite being advised that the Taliban was likely to be attacked), rather than choosing to leave the country knowing that fighting was likely to occur.

Even if Al Odah's failure to explain his trip to Afghanistan and his initial choice to meet with a Ta-

liban official after arriving in Afghanistan could be understood as something other than a decision to join the Taliban's forces, the same cannot be said about Al Odah's choices after September 11, 2001, when he is advised by a Taliban official that attacks are likely to occur. From that point forward, Al Odah declined numerous opportunities to leave the country using the quickest, shortest routes available to him, such as returning to Quetta from Kandahar, traveling to a border town from Logar, or reaching Pakistan through the Kyber pass from Jalalabad. Al Odah declined to travel these routes to safety despite having knowledge of the border areas from his two months of teaching along the border in 2000, as well as knowledge of the route he used to enter Afghanistan on his August 2001 trip. Even after he separated from [TEXT REDACTED BY THE COURT] his initial Taliban contact, Al Odah continued to take directions from individuals who were associated with the Taliban and continued to meet and travel with individuals who appeared to be fighters, despite knowing that attacks on the Taliban were either imminent or underway. He made these choices while, at the same time, also choosing to surrender his passport, accept a weapon, and travel with a large group of armed men into the Tora Bora mountains.

At bottom, this evidence reflects that Al Odah made a conscious choice to ally himself with the Taliban instead of extricating himself from the country. His explanation that he chose to avoid the fighting in Afghanistan but mistakenly ended up carrying a weapon in the Tora Bora mountains during the Battle of Tora Bora becomes increasingly incredible each time the evidence reveals that he moved ever closer

to the fighting and repeatedly accepted directions from those affiliated with the Taliban. Based on all of the evidence in the record, the Court concludes that the only reasonable inference is that Al Odah made a conscious decision to become a part of the Taliban's forces, and not that he became innocently ensnared in fighting after unsuccessfully attempting to leave the country.

* * *

In summary, Al Odah has admitted that he sought to meet with a Taliban official upon his arrival in Afghanistan; that he was subsequently brought by a Taliban official to a Taliban-operated camp near Kandahar, Afghanistan; that he took one day of training with an AK-47 rifle at this camp; that the Taliban official sent him to stay with an associate in Logar, Afghanistan, after September 11, 2001; that he surrendered his passport and other possessions to this individual; that he met with individuals who were armed and appeared to be fighters, that he accepted an AK-47 from these individuals; and that he traveled with his AK-47 into the Tora Bora mountains, remained there during the Battle of Tora Bora, and was captured shortly thereafter by border guards while still carrying his AK-47. The Government has also presented evidence raising a credible inference that Al Odah traveled to Afghanistan for the purpose of fighting with the Taliban and not for the purpose of teaching for two weeks, as well as credible evidence that Al Odah's movements throughout the country were consistent with someone who was taking orders from the Taliban and who decided to join the fight against coalition forces. In

almost every significant respect, Al Odah has failed to provide credible explanations for his travel to Afghanistan and the choices he made as to his movements and activities within Afghanistan. Taken as a whole, the Court finds that this record makes it more likely than not that Al Odah became part of the Taliban's forces. Accordingly, the Court shall deny his petition for habeas corpus.[17]

C. Al Farouq

As described above, the evidence supporting the Court's decision that Al Odah more likely than not joined the forces of the Taliban is supported by, among other evidence, his admission that he attended a Taliban-run camp outside of Kandahar, where he took one day of AK-47 training. While Al Odah's admission that he attended an unidentified Taliban-run camp supports the Government's evidence (and is part of the record evidence the Court has found sufficient for the Government to meet its burden in this case), evidence that the unidentified Taliban camp was, in fact, Al Farouq, al Qaeda's primary Afghan basic training facility, would further strengthen the Government's evidence. In this re-

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[17] The Court notes that the Government presented certain other evidence during the course of the Merits Hearing, which the Court does not reach for purposes of this decision. This evidence includes eye witness identifications of Al Odah by David Hicks and [TEXT REDACTED BY THE COURT], which are far more attenuated, and require far more inferences, than the evidence on which the Court has relied in this case. [TEXT REDACTED BY THE COURT] that the court described in Al Mutair v. United States, Civ A. No. 02-828, 644 F. Supp. 2d 78, 2009 U.S. Dist. LEXIS 66868 at *37-*45 (D.D.C. Aug. 3, 2009).

spect, the Government presented four areas of evidence that lead the Court to conclude that the camp Al Odah attended was more likely than not Al Farouq.

First, Al Farouq was located outside of Kandahar, Ex. 3 at 3 (9/16/08 Decl. of [TEXT REDACTED BY THE COURT]), [TEXT REDACTED BY THE COURT]. Ex. 9. at 4. As discussed above, the Government submitted evidence establishing that some individuals traveled along the same route to Kandahar as Al Odah (Dubai, Karachi, Quetta, Spin Buldak, Kandahar). [TEXT REDACTED BY THE COURT] Ex. 68 at 2; Ex. 80 at 2.

Second, the undisputed evidence in the record is that individuals attending Al Farouq received training on AK-47 rifles early in the Al Farouq training program. Ex. 74 at 1 [TEXT REDACTED BY THE COURT] trained at Al Farouq for two weeks ... [TEXT REDACTED BY THE COURT] claims that he only trained on the Kalashnikov"); Ex. 22 at 9 (Aug. 2002 Interrogation of John Walker Lindh) ("The training at the Al-Farouq camp lasted approximately six to seven weeks . . . and the training was divided into courses. Weapons training lasted three weeks, and included training on the AK-47 Kalashnikov"); Ex. 23 at 1 (2/21/03 Interrogation of David Hicks) ("[a]ll students that take the basic training class at Al Farouq get the same type of training, [which includes]. . . [t]wo weeks of weapons training - students shoot approximately 40 rounds."). Ex. 67 at 3 [TEXT REDACTED BY THE COURT] ("While at the Al-Farouq camp, [TEXT REDACTED BY THE COURT]

was trained on the Kalishnikov"). [TEXT REDACTED BY THE COURT]. Ex. 9 at 4.

Third, the undisputed evidence in the record is that Al Farouq was evacuated shortly after September 11, 2001 attacks, and that many of the individuals attending the camp did not complete training but were marshaled north toward Kabul, Jalalabad, and the Tora Bora mountains. Ex. 22 at 2 (Aug. 2002 Interrogation of John Walker Lindh) ("When the attacks occurred, the Arabs conducting the training gave them three options. The first option was to go to Kabul, the second was to go to an airport outside of Kabul[,] and the third was to go to the mountains.") ; Ex. 69 at 1 [TEXT REDACTED BY THE COURT]); Ex. 80 at 2 [TEXT REDACTED BY THE COURT] As described above, Al Odah stated that he arrived at the camp or in the Kandahar area on September 10, 2001, and left after only one day of training at the camp, moving north in response to [TEXT REDACTED BY THE COURT] instructions -- matching the movements of the trainees at Al Farouq during the same time period.

Fourth, the record is replete with evidence that one of the trainers at Al Farouq was named [TEXT REDACTED BY THE COURT] Ex. 67 at 3 [TEXT REDACTED BY THE COURT] was described as the person who headed the prayers at the camp and also one of the trainers. [TEXT REDACTED BY THE COURT] was the primary trainer who instructed [the detainee] on the Kalishnikov"); Ex. at 2-3 [TEXT REDACTED BY THE COURT]); Ex. 69 at 2 [TEXT REDACTED BY THE COURT]"); Ex. 70 at 2 [TEXT REDACTED BY THE COURT]; Ex. 73 at 4 [TEXT

REDACTED BY THE COURT]; unit's trainer was a man whose 'code name' was [TEXT REDACTED BY THE COURT]. As described above[TEXT REDACTED BY THE COURT] Ex. 9 at 4.

During the Merits Hearing, Al Odah's counsel argued that the Taliban official who transported Al Odah to the camp outside of Kandahar was not the same person as the trainer at Al Farouq for two reasons. First, Al Odah's counsel explained that Al Odah identified someone named [TEXT REDACTED BY THE COURT] whereas the evidence in the record reflected that other detainees identified the Al Farouq trainer as [TEXT REDACTED BY THE COURT] This argument fails. As an initial matter [TEXT REDACTED BY THE COURT] Ex. 69 at 2 [TEXT REDACTED BY THE COURT] Additionally [TEXT REDACTED BY THE COURT] was identified by other detainees as [TEXT REDACTED BY THE COURT] and others as [TEXT REDACTED BY THE COURT] even though Al Odah's counsel does not claim that these detainees are identifying different people. In fact, one interrogation report even identifies [TEXT REDACTED BY THE COURT] as a "code name." Ex. 73 at 4. Finally, the Government submitted evidence that individuals whose true names include neither an "al" nor an "abu" may nevertheless include such terms when constructing an alias or other name variants. *See* Ex. 6 at 5 (9/19/08 Decl. of [TEXT REDACTED BY THE COURT]. Accordingly, the Court is not persuaded that Al Odah's Taliban guide was not [TEXT REDACTED BY THE COURT] because Al Odah referred to him as [TEXT REDACTED BY THE COURT]

The second argument made by Al Odah's counsel was that the physical descriptions differ between the [TEXT REDACTED BY THE COURT] described by Al Odah and the [TEXT REDACTED BY THE COURT] described by other detainees. This is partially correct. [TEXT REDACTED BY THE COURT] Ex. 9 at 4. There are two other descriptions of [TEXT REDACTED BY THE COURT] in the record. Ex. 73 at 4 [TEXT REDACTED BY THE COURT] in his late twenties, was approximately 60 inches tall with a thin build. [TEXT REDACTED BY THE COURT] was fluent in Arabic but [TEXT REDACTED BY THE COURT] was unsure of his nationality"); Ex. 70 at 2 [TEXT REDACTED BY THE COURT] Al Odah argues that these descriptions differ with respect to [TEXT REDACTED BY THE COURT] height (tall, short, and average), and hair color (black, brownish red). While the Court agrees that these constitute differences between the descriptions, the Court emphasizes that [TEXT REDACTED BY THE COURT] name, national origin, beard length, and age, are consistent. The Court finds that these consistencies (particularly name and national origin) are much more significant than the differences identified by Al Odah's counsel involving height and hair color, which are relative descriptions. Based on this record, the Court finds that it is more likely than not that Al Odah and the other detainees were describing the same [TEXT REDACTED BY THE COURT]

Finally, Al Odah's counsel argued during the Merits Hearing that Al Odah could not have attended Al Farouq because the camp he described did not match the physical description of Al Farouq. As support, Al

Odah relies on the statement of an analyst in one of Al Odah's interrogation reports, reflected as follows:

[TEXT REDACTED BY THE COURT]

Ex. 54 at [TEXT REDACTED BY THE COURT] Al Odah's counsel is correct that the assessment by this analyst, in the context of Al Odah's statement, must be considered in the context of the evidence in the record.

Upon consideration of the entire record, the Government has submitted evidence showing that some individuals traveled to Afghanistan using the same route as Al Odah and that they were traveling to Al Farouq; that AK-47 training was an early part of the Al Farouq training program; that Al Farouq was evacuated shortly after September 11, 2001, when trainees were sent north toward Kabul, Jalalabad, or the Tora Bora mountains; and that the individual who transported Al Odah from the Afghanistan-Pakistan border to a camp outside of Kandahar was likely a trainer at Al Farouq. Through Al Odah's admissions, the Government has also submitted evidence that Al Odah was brought to a camp outside of Kandahar (where Al Farouq was located) on or around September 10, 2001; that he received one day of training on an AK-47; that he was shortly thereafter evacuated and directed to travel north to Logar (a province just south of Kabul); and that he eventually traveled to Jalalabad and the Tora Bora mountains. In contrast, Al Odah has identified evidence in the record suggesting that the description Al Odah provided to an interrogator of the camp that he visited did not match the physical description of Al Farouq. After weighing all of the evidence in the record, the

Court finds that the camp to which Al Odah was transported by [TEXT REDACTED BY THE COURT] was more likely than not Al Farouq. When this evidence is considered in the context of Al Odah's travel north at the direction of [TEXT REDACTED BY THE COURT], and Al Odah's subsequent activities described above, the Court finds that it is more likely than not that Al Odah became part of the forces of the Taliban and al Qaeda.

In summary, the Court finds that the Government has met its burden based on the evidence in the record without specifically identifying that the Taliban-run camp attended by Al Odah was, in fact, Al Farouq. Nevertheless, the Court also finds that it is more likely than not that the camp was Al Farouq, which also makes it more likely than not, when combined with the other evidence in the record, that Al Odah became a part of the forces of the Taliban and al Qaeda.

III. CONCLUSION

Because the Government has met its burden by a preponderance of the evidence in this case, the Court shall DENY Al Odah's petition for habeas corpus.

Date: August 24, 2009

/s/

COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-828 (CKK)

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,

Respondents.

ORDER
(August 24, 2009)

For the reasons set forth in the Court's Classified Memorandum Opinion issued to the parties on this date, it is, this 24th day of August, 2009, hereby

ORDERED that Petitioner Fawzi Khalid Abdullah Fahad Al Odah's petition for habeas corpus is DENIED; and it is further

ORDERED that the relevant agencies shall complete a classification review of the Court's Classified Memorandum Opinion and shall provide the Court with an Unclassified version within 72 hours of receiving the Court's Classified Memorandum Opinion.

This is a Final, Appealable Order.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX D)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-828 (CKK)

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
Petitioners,

v.

UNITED STATES, ET AL.,
Respondents.

ORDER

(June 16, 2009)

The Court held a closed-session Status Hearing in the above-captioned case on June 16, 2009. For the reasons stated on the record, it is, this 16th day of June, 2009, hereby

ORDERED that Respondents' Motion to Admit Hearsay Evidence with a Presumption of Accuracy and Authenticity is GRANTED-IN-PART as to the admission of hearsay and HELD-IN-ABEYANCE-IN-PART as to presumptions of accuracy and authenticity, which shall be resolved in the context of the individual Petitioners' Merits Hearings; it is further

ORDERED that Petitioners' Motion to Admit Hearsay is GRANTED; it is further

ORDERED that Respondents' Motion to Amend the Statement of Facts and Exhibit List as to Petitioner Fayiz Al Kandari is GRANTED; it is further

ORDERED that Petitioners' Motion to Exclude Documents Provided to Counsel Only in Redacted Form is DENIED-AS-MOOT; it is further

ORDERED that the following motions shall be HELD-IN-ABEYANCE and resolved in the context of the individual Petitioners' Merits Hearings: Petitioners' Motion to Exclude Certain Statements of Petitioner Fouad Al Rabiah; Petitioners' Motion to Exclude Certain Evidence and Allegations that Have Not Been Shown to Them; Petitioners' Motion to Exclude Certain Documents as to which the Government Has Failed to Establish Authenticity or Relevance to Petitioners; Petitioners' Motion to Exclude Reports Related to Alleged Photographic Identifications; it is further

ORDERED that Petitioners' Motion for Sanctions is HELD-IN-ABEYANCE, but the Court shall ORDER that the traverses filed by other petitioners in Guantanamo Bay habeas proceedings shall be considered reasonably available for purposes of Respondents' obligations to review and disclose exculpatory evidence pursuant to the Case Management Order, as amended, and this Court's Discovery Orders; it is further

ORDERED that the Court shall hold a Merits Hearing for Petitioner Khaled Al Mutairi on July 6, 2009, at 9:30 A.M., in Courtroom 28A, to continue on July 7, 2009, at 9:30 A.M., in Courtroom 28A, if necessary. In connection with this hearing, the record for the Court's consideration shall consist of all evidence identified in the parties' respective Witness and Exhibit Lists. Motions for leave to amend the parties' respective Witness and Exhibit Lists or Res-

pondents' Statement of Facts must be filed no later than June 29, 2009. The parties are on notice that any evidence that has not been identified in the Witness and Exhibit Lists and disclosed to opposing counsel on or before June 29, 2009, may be excluded from consideration by the Court. The only two exceptions to the June 29, 2009 deadline shall be (1) documents offered solely for the rebuttal of arguments made at the Merits Hearing that could not reasonably have been anticipated prior to June 29, 2009, or (2) exculpatory information, as to which Respondents have a continuing obligation to disclose to Petitioners; it is further

ORDERED that the Court shall hold a Merits Hearing for Petitioner Fawzi Al Odah on July 20, 2009 at 9:30 A.M., in Courtroom 28A, to continue on July 21, 2009, at 9:30 A.M., in Courtroom 28A, if necessary. In connection with this hearing, the record for the Court's consideration shall consist of all evidence identified in the parties' respective Witness and Exhibit Lists. Motions for leave to amend the parties' respective Witness and Exhibit Lists or Respondents' Statement of Facts must be filed no later than July 13, 2009. The parties are on notice that any evidence that has not been identified in the Witness and Exhibit Lists and disclosed to opposing counsel on or before July 13, 2009, may be excluded from consideration by the Court. The only two exceptions to the July 13, 2009 deadline shall be (1) documents offered solely for the rebuttal of arguments made at the Merits Hearing that could not reasonably have been anticipated prior to June 29, 2009, or (2) exculpatory information, as to which Respondents

have a continuing obligation to disclose to Petitioners; it is further

ORDERED that the parties shall confer and file Joint Proposed Procedures for Petitioners' Merits Hearings on or before June 19, 2009; and it is further

ORDERED that the Court shall hold a conference call on June 17, 2009, at 10:00 A.M., during which Respondents shall describe the volume of documents in the Guantanamo Review Task Force database associated with each of the four Petitioners, and the estimated time it would take to review and disclose documents to Petitioners in accordance with the Court's April 7, 2009 Order.

SO ORDERED.

Date: June 16, 2009

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 02-cv-0828, 04-cv-1136, 04-cv-1164, 04-cv-1194, 04-cv-1254, 04-cv-1937, 04-cv-2022, 04-cv-2046, 04-cv-2215, 05-cv-0023, 05-cv-0247, 05-cv-0270, 05-cv-0280, 05-cv-0329, 05-cv-0359, 05-cv-0392, 05-cv-0492, 05-cv-0520, 05-cv-0526, 05-cv-0569, 05-cv-0634, 05-cv-0748, 05-cv-0763, 05-cv-0764, 05-cv-0877, 05-cv-0883, 05-cv-0889, 05-cv-0892, 05-cv-0993, 05-cv-0994, 05-cv-0998, 05-cv-0999, 05-cv-1048, 05-cv-1189, 05-cv-1124, 05-cv-1220, 05-cv-1244, 05-cv-1347, 05-cv-1353, 05-cv-1429, 05-cv-1457, 05-cv-1458, 05-cv-1487, 05-cv-1490, 05-cv-1497, 05-cv-1504, 05-cv-1505, 05-cv-1506, 05-cv-1555, 05-cv-1592, 05-cv-1601, 05-cv-1607, 05-cv-1623, 05-cv-1638, 05-cv-1645, 05-cv-1646, 05-cv-1678, 05-cv-1971, 05-cv-1983, 05-cv-2010, 05-cv-2088, 05-cv-2104, 05-cv-2185, 05-cv-2186, 05-cv-2199, 05-cv-2249, 05-cv-2349, 05-cv-2367, 05-cv-2371, 05-cv-2378, 05-cv-2379, 05-cv-2380, 05-cv-2384, 05-cv-2385, 05-cv-2386, 05-cv-2387, 05-cv-2444, 05-cv-2479, 06-cv-0618, 06-cv-1668, 06-cv-1684, 06-cv-1690, 06-cv-1758, 06-cv-1761, 06-cv-1765, 06-cv-1766, 06-cv-1767, 07-cv-1710, 07-cv-2337, 07-cv-2338, 08-cv-0987, 08-cv-1085, 08-cv-1101, 08-cv-1104, 08-cv-1153, 08-cv-1185, 08-cv-1207, 08-cv-1221, 08-cv-1223, 08-cv-1224, 08-cv-1227, 08-cv-1228, 08-cv-1230, 08-cv-1232, 08-cv-1233, 08-cv-1235, 08-cv-1236, 08-cv-1237, 08-cv-1238, 08-cv-1360, 08-cv-1440, 08-cv-1733, 08-cv-1805

IN RE GUANTANAMO DETAINEE LITIGATION

CASE MANAGEMENT ORDER

Upon review of the parties' briefs in response to the Court's order of July 11, 2008, and the record herein, and to provide the petitioners in these cases with prompt habeas corpus review, *see Boumediene v. Bush*, 128 S. Ct. 2229, 2275 (2008), while "proceed[ing] with the "caution" necessary in this context, *Hamdi v. Rumsfeld*, 542 U.S. 507, 539 (2004) (plurality), and not "disregard[ing] the dangers the detention in these cases was intended to prevent," *Boumediene*, 128 S. Ct. at 2276, the Court enters the following Case Management Order to govern proceedings in the above-captioned cases.[1]

I.

A. Factual Returns.[2] In accordance with the Court's order of July 29, 2008, as amended by the

[1] While the framework detailed in this Order governs proceedings in all cases consolidated before this Court, the judges to whom the cases are assigned for final resolution ("Merits Judges") may alter the framework based on the particular facts and circumstances of their individual cases. Additionally, the Merits Judges will address procedural and substantive issues not covered in this Order.

[2] When used in this Order, the term "factual return" refers to factual returns and proposed amended factual returns filed pursuant to the Court's order of July 29, 2008, as amended by the Court's order of September 19, 2008.

(footnote cont'd)

Court's order of September 19, 2008, the government shall file returns and proposed amended returns containing the factual basis upon which it is detaining the petitioner. *Cf. Hamdi*, 542 U.S. at 533 (holding that a "citizen detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification").

B. Legal Justification. The government shall file a succinct statement explaining its legal justification for detaining the petitioner. If the government's justification for detention is the petitioner's status as an enemy combatant, the government shall provide the definition of enemy combatant on which it relies.

In cases in which the government already filed a factual return, the legal justification is due within 7 days of the date of this Order. In all other cases, the government shall include the legal justification with the factual return.

C. Unclassified Factual Returns. Within 14 days of the date of this Order, the government shall file an unclassified version of each factual return it has filed to date. In cases in which the government has yet to file a factual return, the government shall file an unclassified version of the return within 14 days of the date on which the government is to file the factual return.

D. Exculpatory Evidence.

1. The government shall disclose to the petitioner all reasonably available evidence in its possession

that tends materially to undermine the information presented to support the government's justification for detaining the petitioner. See Boumendiene, 128 S. Ct. at 2270 (holding that habeas court "must have the authority to admit and consider relevant exculpatory evidence that was not introduced during the [CSRT] proceeding"). In cases in which the government already filed a factual return, disclosure of such exculpatory evidence shall occur within 14 days of the date of this Order. In all other cases, disclosure shall occur within 14 days of the date on which the government files the factual return. By the date on which disclosure is to occur under this paragraph, the government shall file a notice certifying either that it has disclosed the exculpatory evidence or that it does not possess any exculpatory evidence.

2. If evidence described in the preceding paragraph becomes known to the government after the date on which the government was to disclose exculpatory evidence in a petitioner's case, the government shall provide the evidence to the petitioner as soon as practicable.

E. Discovery.

1. If requested by the petitioner, the government shall disclose to the petitioner: (1) any documents or objects in its possession that are referenced in the factual return; (2) all statements, in whatever form, made or adopted by the petitioner that relate to the information contained in the factual return; and (3) information about the circumstances in which such statements of the petitioner were made or adopted. Cf. *Harris v. Nelson*, 394 U.S. 286, 300 n.7 (1969) ("[D]istrict courts have the power to require discov-

ery when essential to render a habeas corpus proceeding effective."). In cases in which the government already filed a factual return, requested disclosure shall occur within 14 days of the date on which the petitioner requests the disclosure. In all other cases, requested disclosure shall occur within 14 days of the date on which the government files the factual return or within 14 days of the date on which the petitioner requests disclosure, whichever is later.

2. The Merits Judge may, for good cause, permit the petitioner to obtain limited discovery beyond that described in the preceding paragraph. *Cf. Bracy v. Gramley*, 520 U.S. 899, 904 (1997) ("A habeas petitioner, unlike the usual civil litigant in federal court, is not entitled to discovery as a matter of ordinary course."). Discovery requests shall be presented by written motion to the Merits Judge and (1) be narrowly tailored, not open-ended; (2) specify the discovery sought; (3) explain why the request, if granted, is likely to produce evidence that demonstrates that the petitioner's detention is unlawful, *see Harris*, 394 U.S. at 300 ("[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry."); and (4) explain why the requested discovery will enable the petitioner to rebut the factual basis for his detention without unfairly disrupting or unduly burdening the government, *cf. Hamdi*, 542 U.S. at 533 (holding that "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut

the Government's factual assertions before a neutral decisionmaker"); *id.* at 534 ("[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."). The Merits Judge will set the date by which all discovery must be completed.

F. Classified Information. If any information to be disclosed to the petitioner under Sections I.D or I.E of this Order is classified, the government shall provide the petitioner with an adequate substitute and, unless granted an exception, provide the petitioner's counsel with the classified information, provided the petitioner's counsel is cleared to access such information under Section D of the Protective Order entered in the petitioner's case. If the government objects to providing the petitioner's counsel with the classified information on the basis that, in the interest of national security, the information should not be disclosed, the government shall move for an exception to disclosure and provide the information to the Merits Judge in camera for a determination as to whether the information should be disclosed and, if not disclosed, whether the government will be permitted to rely on the information to support detention. *See Boumediene*, 128 S. Ct. at 2276 ("[T]he Government has a legitimate interest in protecting sources and methods of intelligence gathering; and we expect that the District Court will use its discretion to accommodate this interest to the greatest extent possible."); *CIA v. Sims*, 471 U.S. 159, 175 (1985) ("The Government has a compelling interest in protecting . . . the secrecy of information important to our national security . . . ." (citation omitted)).

G. Traverse. In response to the government's factual return, the petitioner shall file a traverse containing the relevant facts and evidence supporting the petition. *See Boumediene*, 128 S. Ct. at 2273 ("If a detainee can present reasonably available evidence demonstrating there is no basis for his continued detention, he must have the opportunity to present this evidence to a habeas corpus court."); *cf. Hamdi*, 542 U.S. at 533 (holding that a "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker"). Traverses are due within 14 days of the date on which the government files notice relating to exculpatory evidence under Section I.D.1 of this Order. The Merits Judge may, for good cause, permit the petitioner to amend or supplement a filed traverse.

II.

A. Burden and Standard of Proof. The government bears the burden of proving by a preponderance of the evidence that the petitioner's detention is lawful. *Boumediene*, 128 S. Ct. at 2271 ("The extent of the showing required of the government in these cases is a matter to be determined.").

B. Presumption in Favor of the Government's Evidence. The Merits Judge may accord a rebuttable presumption of accuracy and authenticity to any evidence the government presents as justification for the petitioner's detention if the government establishes that the presumption is necessary to alleviate an undue burden presented by the particular habeas corpus proceeding. See Hamdi, 542 U.S. at 534

("[E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. . . . [For example,] the Constitution would not be offended by a presumption in favor of the government's evidence, so long as that presumption remained a rebuttable one and a fair opportunity for rebuttal were provided."); *Boumediene*, 128 S. Ct. at 2276 ("Certain accommodations can be made to reduce the burden habeas corpus proceedings will place on the military without impermissibly diluting the protections of the writ."). If the Merits Judge determines that a presumption is warranted, the petitioner will receive notice of the presumption and an opportunity to rebut it.

C. Hearsay. On motion of either the petitioner or the government, the Merits Judge may admit and consider hearsay evidence that is material and relevant to the legality of the petitioner's detention if the movant establishes that the hearsay evidence is reliable and that the provision of nonhearsay evidence would unduly burden the movant or interfere with the government's efforts to protect national security. See Hamdi, 542 U.S. at 533-34 (noting that, in enemy-combatant proceedings, "[h]earsay . . . may need to be accepted as the most reliable available evidence"). The proponent of hearsay evidence shall move for admission of the evidence no later than 7 days prior to the date on which the initial briefs for judgment on the record are due under Section III.A.1 of this Order. The party opposing admission shall respond to the motion within 3 days of its filing. If the Merits Judge admits hearsay evidence, the party opposing admission will have the opportunity to chal-

lenge the credibility of, and weight to be accorded, such evidence.

III.

A. Judgment on the Record.

1. Initial Briefs. Within 14 days of the filing of the traverse, or within 14 days of the date of this Order in cases in which the petitioner already filed a traverse, the petitioner and the government shall each file a brief in support of judgment on the record. Each brief shall address both the factual basis and the legal justification for detention, *see Boumediene*, 128 S. Ct. at 2269 ("The habeas court must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain."), and be accompanied by a separate statement of material facts as to which the party contends there is no genuine dispute. The statement of material facts shall cite to the specific portions of the record that support the party's contention that a fact is not in dispute and shall not contain argument. Initial briefs shall not exceed 45 pages, excluding the statement of material facts.

2. Response Briefs. Within 7 days of the filing of initial briefs, the parties shall file response briefs. Each response brief shall be accompanied by a factual response statement that either admits or controverts each fact identified in the opposing party's statement of material facts as one to which there is no genuine dispute. The factual response shall cite to the specific portions of the record that support the party's contention that a fact is disputed. The Court may treat as conceded any legal argument presented in an initial brief that is not addressed in the re-

sponse brief and may assume that facts identified in the statement of material facts are admitted unless controverted in the factual response. Response briefs shall not exceed 35 pages, excluding the factual response.

3. Reply Briefs. Reply briefs may be filed only by leave of court.

4. Hearing. The Merits Judge may allow oral argument.

B. Evidentiary Hearing.

1. Basis for a Hearing. If, after reviewing the parties' briefs for judgment on the record, the Merits Judge determines that substantial issues of material fact preclude final judgment based on the record, the petitioner is entitled to an evidentiary hearing. Cf. Stewart v. Overholser, 186 F.2d 339, 342 (D.C. Cir. 1950) ("When a factual dispute is at the core of a detention challenged by an application for the writ it ordinarily must be resolved by the hearing process.").

2. Prehearing Conference. Counsel shall appear for a prehearing conference to discuss and narrow the issues to be resolved at the hearing, discuss evidentiary issues that might arise at the hearing, identify witnesses and documents that they intend to present at the hearing, and discuss the procedures for the hearing.

3. Petitioner's Presence. The petitioner will not have access to classified portions of the hearing. Through available technological means that are appropriate and consistent with protecting classified information and national security, the Merits Judge

will attempt to provide the petitioner with access to unclassified portions of the hearing.

SO ORDERED.

November 6, 2008
/s/
Thomas F. Hogan
United States District Judge

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONST., AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. § 2241

Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.(c) The writ of habeas corpus shall not extend to a prisoner unless--

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent jurisdiction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

(e) (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

(2) Except as provided in paragraphs (2) and (3) of section 1005(e) of the Detainee Treatment Act of 2005 (10 U.S.C. 801 note), no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

28 U.S.C. § 2246

Evidence; depositions; affidavits

On application for a writ of habeas corpus, evidence may be taken orally or by deposition, or, in the discretion of the judge, by affidavit. If affidavits are admitted any party shall have the right to propound written interrogatories to the affiants, or to file answering affidavits.

FED. R. EVID. 802

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Su-

preme Court pursuant to statutory authority or by Act of Congress.

FED. R. EVID 1101(E)

Rules applicable in part. In the following proceedings these rules apply to the extent that matters of evidence are not provided for in the statutes which govern procedure therein or in other rules prescribed by the Supreme Court pursuant to statutory authority: ... habeas corpus under sections 2241-2254 of title 28, United States Code ....

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(3)

No. 10-439

In the Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether intelligence reports and other "hearsay" evidence commonly used by the military to justify the detention of individuals captured abroad during armed conflict is admissible in habeas corpus proceedings challenging the detention of foreign nationals at Guantanamo Bay, Cuba, when a court determines that such evidence is reliable when considered in context.

2. Whether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings.

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FAWZI KHALID ABDULLAH FAHAD AL ODAH, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The unclassified version of the opinion of the court of appeals (Pet. App. a1-a20) is reported at 611 F.3d 8. The unclassified version of the opinion of the district court (Pet. App. a21-a57) is reported at 648 F. Supp. 2d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2010. The petition for a writ of certiorari was filed on September 28, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Al Odah (petitioner) is an alien detained at the United States Naval Station at Guantanamo Bay,

Cuba, under the Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224. He petitioned for a writ of habeas corpus, and the district court denied the petition. The court of appeals affirmed. Pet. App. a1-a20.

1. In response to the attacks of September 11, 2001, Congress enacted the AUMF, which authorizes "the President * * * to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." AUMF § 2(a), 115 Stat. 224. The President has ordered the Armed Forces to subdue both the al-Qaida terrorist network and the Taliban regime that harbored it in Afghanistan. Armed conflict with al-Qaida and the Taliban remains ongoing, and in connection with those conflicts, the United States and its allies have captured many persons who are part of al-Qaida or Taliban forces and detained a small fraction of them at Guantanamo Bay.

2. Petitioner, an alien detained at Guantanamo Bay under the AUMF, filed a petition for a writ of habeas corpus. His petition was filed before this Court held in *Boumediene* v. *Bush*, 553 U.S. 723 (2008), that district courts have jurisdiction to consider habeas petitions filed by Guantanamo detainees, and proceedings were stayed pending resolution of that jurisdictional issue. After *Boumediene*, the government filed a factual return to the habeas petition, and petitioner filed a traverse. Pet. App. a23-a25.

3. After conducting a three-day hearing, the district court denied the habeas petition. Pet. App. a21-a57. As an initial matter, the court explained that it would consider hearsay evidence introduced by the parties. Not-

ing this Court's statement in *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004), that "[h]earsay . . . may need to be accepted as the most reliable available evidence from the Government." Pet. App. a25 (quoting *Hamdi*, 542 U.S. at 533-534 (plurality opinion)), the district court determined that "allowing the use of hearsay by both parties balances the need to prevent the substantial diversion of military and intelligence resources during a time of hostilities, while at the same time providing [petitioner] with a meaningful opportunity to contest the basis of his detention," *id.* at a26. The court explained that it was "fully capable of considering whether a piece of evidence (whether hearsay or not) is reliable," and it stated that it would "make such determinations in the context of the evidence," taking into account "any arguments the parties have made concerning the unreliability of hearsay evidence." *Ibid.* The court further stated that it would not give the government's evidence "a presumption of accuracy and authenticity," *ibid.*, but instead would "consider the accuracy or authenticity of the evidence in the context of the entire record and the arguments raised by the parties," *id.* at a28.

The district court also held that "the Government bears the burden of proving by a preponderance of the evidence that [petitioner] is lawfully detained." Pet. App. a32. The court stressed that, under that standard, petitioner "need not prove his innocence nor testify on his own behalf," and it emphasized that it had not drawn any inference from petitioner's failure to testify. *Ibid.*

The district court next examined three categories of evidence, largely based on petitioner' own statements, that supported a finding that petitioner "more likely than not became part of Taliban and al Qaeda forces in Afghanistan." Pet. App. a32. First, the court consid-

ered petitioner's August 2001 journey from Kuwait to Afghanistan. *Id.* at a33. Petitioner admitted that he sought to meet a Taliban official upon arriving in Afghanistan; he made statements concerning his travels that the court found to be "not credible"; and he used the same route as others who were traveling to Afghanistan to engage in jihad. *Id.* at a38. Based on those facts, the court determined that the "record supports a reasonable inference that [petitioner] may have also been traveling to Afghanistan to engage in jihad." *Ibid.*

Second, the court considered petitioner's activities within Afghanistan. Although petitioner claimed that he attempted to leave Afghanistan after September 11, 2001, the court found that claim not to be credible. Pet. App. a40-a43. The court observed that petitioner admitted attending a Taliban camp where he trained with an AK-47 rifle, *id.* at a39, and that his own statements further established "his meeting with individuals who appeared to be armed fighters [and] his travel into the Tora Bora mountains with armed men toward the armed conflict, where he remained through the Battle of Tora Bora and where he was ultimately captured while carrying his AK-47," *id.* at a45. The court concluded that "the only reasonable inference is that [petitioner] made a conscious decision to become a part of the Taliban's forces." *Id.* at a50.

Although the district court found the first two categories of evidence "sufficient for the Government to meet its burden," the court went on to explain that the training camp petitioner attended was more likely than not "Al Farouq, al Qaeda's primary Afghan basic training facility." Pet. App. a51. That fact, the district court concluded, "also makes it more likely than not, when combined with the other evidence in the record, that

[petitioner] became a part of the forces of the Taliban and al Qaeda." *Id.* at a57.

3. The court of appeals affirmed. Pet. App. a1-a20. The court stated that it was "now well-settled law that a preponderance of the evidence standard is constitutional in considering a habeas petition from an individual detained pursuant to authority granted by the AUMF." *Id.* at a11 (citing *Al-Bihani* v. *Obama*, 590 F.3d 866 (D.C. Cir. 2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); *Awad* v. *Obama*, 608 F.3d 1 (D.C. Cir. 2010), petition for cert. pending, No. 10-736 (filed Nov. 30, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (D.C. Cir. 2010)). The court next rejected petitioner's argument "that the Federal Rules of Evidence and the habeas corpus statute, 28 U.S.C. § 2241 et seq., restrict the situations in which a district court may admit hearsay evidence in considering a petition from a person detained pursuant to the AUMF." Pet App. a12. The court explained that "[t]he fact that the district court generally relied on items of evidence that contained hearsay is of no consequence. To show error in the court's reliance on hearsay evidence, the habeas petitioner must establish not that it is hearsay, but that it is unreliable hearsay." *Ibid.* (citation and internal quotation marks omitted). In this case, the court of appeals explained, "[t]he government offered reasons why its hearsay evidence had indicia of reliability, and the [district] court considered the reliability of the evidence in deciding the weight to give the hearsay evidence." *Id.* at a13. After rejecting petitioner's procedural challenges, the court of appeals held that there was sufficient evidence supporting the district court's finding that petitioner was "part of" al Qaeda and Taliban forces. *Id.* at a13-a19.

ARGUMENT

Petitioner argues (Pet. 11-16) that district courts should not consider hearsay evidence in evaluating habeas corpus petitions brought by individuals detained at Guantanamo Bay under the AUMF, and (Pet. 16-19) that, in responding to such petitions, the government should be required to prove by more than a preponderance of the evidence that detention is proper. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or any other court of appeals.

To date, the district courts have issued decisions in habeas cases involving 58 detainees, granting writs of habeas corpus for 38 detainees and denying writs for 20 detainees. The D.C. Circuit has now issued published decisions in seven cases, affirming the denial of writs of habeas corpus in four cases including this one, see *Al-Bihani* v. *Obama*, 590 F.3d 866 (2010), petition for cert. pending, No. 10-7814 (filed Nov. 29, 2010); *Awad* v. *Obama*, 608 F.3d 1 (2010), petition for cert. pending, No. 10-736 (filed Nov. 30, 2010); *Barhoumi* v. *Obama*, 609 F.3d 416 (2010), reversing the grant of a writ in one case, see *Al-Adahi* v. *Obama*, 613 F.3d 1102 (2010), petition for cert. pending, No. 10-487 (filed Oct. 8, 2010), vacating the grant of a writ and remanding for further proceedings in one case, see *Salahi* v. *Obama*, 625 F.3d 745 (2010), and reversing the denial of a writ and remanding for further proceedings in one case, see *Bensayah* v. *Obama*, 610 F.3d 718 (2010). No D.C. Circuit panel has held that the admission of hearsay evidence, subject to the district court's assessment of its reliability and probative value, is improper in this unique context. And no D.C. Circuit judge or district court judge has concluded that a standard of proof more

rigorous than preponderance of the evidence should apply.

In short, the lower courts have properly performed the task that this Court assigned them in *Boumediene* v. *Bush*, 553 U.S. 723 (2008)—they have developed "procedural and substantive standards," *id.* at 796, for habeas proceedings for military detainees. Nothing in the Constitution or any other source of law requires the application of different standards or procedures. Further review is not warranted.

1. Petitioner contends that the court of appeals erred in relying upon intelligence reports and other "hearsay" evidence in assessing the lawfulness of his detention. Specifically, he argues (Pet. 11) that a unanimous series of D.C. Circuit decisions holding that hearsay evidence is admissible and instructing the district court judges to assess the reliability and probative value of such evidence, see Pet. App. a12-a13; *Awad*, 608 F.3d at 7; *Al-Bihani*, 590 F.3d at 879, have "undermined" the habeas right recognized in *Boumediene* and are contrary to the Federal Rules of Evidence. Those arguments lack merit.

a. This Court has recognized that habeas proceedings for detainees held by the military are unique, and that the standards and evidentiary rules that would apply in a domestic criminal case are not necessarily applicable in this context. See *Boumediene*, 553 U.S. at 783 ("Habeas corpus proceedings need not resemble a criminal trial."); *Hamdi* v. *Rumsfeld*, 542 U.S. 507, 535 (2004) (plurality opinion) (recognizing that the "full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate" in habeas proceedings for military detainees). In proceedings challenging the military's detention of individuals

captured abroad during an armed conflict, information generated by the military—and by other agencies operating abroad—will generally be not only the most relevant and probative evidence, but often the only evidence bearing on the legality of the detention. It is appropriate for courts to consider the same types of evidence that the military necessarily uses when it makes detention decisions. See *id.* at 531 (plurality opinion) (noting that the "law of war and the realities of combat may render [military] detentions both necessary and appropriate, and * * * our Constitution recognizes that core strategic matters of warmaking belong in the hands of those who are best positioned and most politically accountable for making them").

Indeed, *Hamdi* strongly suggests that intelligence reports should, as a general rule, be admissible in habeas proceedings for detainees held by the military. The plurality in *Hamdi* explicitly recognized that the government could support the detention of a United States citizen with "documentation regarding battlefield detainees already * * * kept in the ordinary course of military affairs," 542 U.S. at 534, such as the intelligence reports that form the core evidentiary basis for most of the Guantanamo habeas cases, see *id.* at 538 (approving of hearsay evidence contained in declaration of government official). Likewise, this Court recognized in *Boumediene* that habeas proceedings are flexible and may be adapted to circumstances as necessary, including the unique military setting at issue here. 553 U.S. at 779 (stressing that "common-law habeas corpus was, above all, an adaptable remedy"). The Court therefore noted that "accommodations can be made" in this exceptional context "to reduce the burden habeas corpus proceedings will place on the military without impermissibly

diluting the protections of the writ." *Id.* at 795. And the Court cautioned that, in developing "procedural and substantive standards," the lower courts should accord "proper deference * * * to the political branches." *Id.* at 796.

Adhering to *Hamdi* and *Boumediene*, the district courts and the court of appeals have developed a set of procedural rules to govern the habeas proceedings for the detainees held by the military at Guantanamo. As this case illustrates, within the context of these unique proceedings, district court judges generally admit and consider intelligence reports and other "hearsay" evidence, and assess its reliability and probative value. Pet. App. a26. In making those case-specific and highly contextual assessments, the district courts have not blindly accepted the government's proffers. See *e.g.*, *Al Rabiah* v. *United States*, 658 F. Supp. 2d 11, 28-40 (D.D.C. 2009). Unlike juries, district court judges understand the limitations of certain types of hearsay evidence and have experience in evaluating the reliability of such evidence. Cf. *Bourjaily* v. *United States*, 483 U.S. 171, 180 (1987) (holding that district courts may consider hearsay in assessing the admissibility of evidence). And in performing that gatekeeping function, the district court judges have had the benefit of detailed declarations from the government concerning intelligence-gathering methods and techniques used to create different types of reports. See, *e.g.*, C.A. App. 467-506.

Significantly, in many cases, much of the "hearsay" evidence supporting detention consists simply of military or other reports recording what the detainee has said. Leaving aside the threshold point that records of a party's own statements do not constitute "hearsay,"

see Fed. R. Evid. 801(d)(2)(A), there are fewer legitimate bases for questioning the reliability of such routine records than for questioning more attenuated intelligence reports where the sources of the information are not clear, see *Parhat* v. *Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (stressing that hearsay evidence "must be presented in a form, or with sufficient additional information, that permits the Tribunal and court to assess its reliability"). In such circumstances, a detainee can challenge the reliability of reports purporting to summarize what he has previously admitted simply by testifying at the habeas hearing—a right open to all detainees in these proceedings. Where, as here, the petitioner elects not to challenge the reliability of any specific evidence on which the district court relied in finding that his detention was lawful—evidence that was largely based on his own prior statements—a global challenge to the admission of all hearsay evidence has considerably less force. Thus, as this case illustrates, the approach to hearsay endorsed by the court of appeals and applied by the district courts is correct and is fully consistent with both *Hamdi* and *Boumediene*.

b. Despite the flexibility that this Court contemplated in *Hamdi* and *Boumediene*, petitioner argues that Federal Rule of Evidence 1101(e) compels strict application of the rules generally applicable to hearsay evidence, even in habeas proceedings involving detainees held by the military. Petitioner's argument is flawed in several respects.

As an initial matter, the Federal Rules of Evidence do not apply because this is a constitutional habeas case, not a statutory one. Rule 1101(e) enumerates various categories of cases in which the rules of evidence "apply to the extent that matters of evidence are not provided

for in the statutes which govern procedure therein," including "habeas corpus under sections 2241-2254 of title 28, United States Code." But this is not a statutory habeas case; to the contrary, 28 U.S.C. 2241(e) makes clear that courts have no statutory jurisdiction to consider habeas petitions from Guantanamo detainees. As Justice Souter observed in his concurring opinion in *Boumediene*, what remains "must be constitutionally based jurisdiction or none at all." 553 U.S. at 799; see *Al-Bihani*, 590 F.3d at 877 (these habeas proceedings are not "bound by the procedural limits created for other detention contexts"). Because this is not a proceeding "under sections 2241-2254," it is not addressed in Rule 1101(e). The court of appeals was therefore correct to conclude that the relevant question is not whether hearsay is admissible under the Federal Rules of Evidence but rather whether such evidence is sufficiently reliable to provide support for the specific detention at issue. See *Al-Bihani*, 590 F.3d at 879 (explaining that "the question a habeas court must ask when presented with hearsay is not whether it is admissible—it is always admissible—but what probative weight to ascribe to whatever indicia of reliability it exhibits").

Moreover, even if Section 2241 were to provide the jurisdiction over this proceeding, the Federal Rules of Evidence are applicable only to the extent that "matters of evidence are not provided for in the statutes which govern procedure therein or in other rules." Fed. R. Evid. 1101(e). Here, application of the Federal Rules of Evidence (and their prohibition on hearsay) cannot be reconciled with the relevant Congressional enactments. See Detainee Treatment Act of 2005 (DTA), Pub. L. No. 109-148, Tit. X, § 1005(e), 119 Stat. 2742; Military Commissions Act of 2006 (MCA), Pub. L. No. 109-366, § 7,

120 Stat. 2635-2636. In both the DTA and the MCA, Congress expressly precluded statutory habeas review and sought to replace it with a direct-review regime in the court of appeals. In doing so, Congress recognized that the ordinary statutory habeas rules and procedures were a poor fit for the process of assessing evidence drawn from military and intelligence information. While this Court held in *Boumediene* that constitutional habeas review must remain available, it remains clear that Congress did not intend for all of the statutory habeas procedures and rules of evidence, which were not designed to address the unique military detention context, to apply in hearings regarding the lawfulness of the detention of the Guantanamo detainees under the AUMF.

In light of Congress's manifest purpose for these specific proceedings, rigid application of more general evidentiary rules governing hearsay would be inappropriate. See *Morales* v. *TWA*, 504 U.S. 374, 384 (1992) ("[I]t is a commonplace of statutory construction that the specific governs the general."). And given this Court's repeated recognition in *Boumediene* that "[c]ertain accommodations can be made" in developing the procedures for these habeas proceedings, 553 U.S. at 795, it would make little sense to say that the Court's ruling compelled strict adherence to the Federal Rules of Evidence. For that reason, petitioner's argument (Pet. 13) that "[t]here is no indication that the *Hamdi* plurality intended to modify or repeal Fed. R. Evid. 1101(e)," is beside the point. What matters is that *Congress* plainly intended to preclude any habeas review for Guantanamo detainees, and *Boumediene* restored only what is constitutionally required of habeas review while expressly recognizing the need for both procedural and

substantive accommodations to be made in this unique context. 553 U.S. at 795.

Petitioner contends that strict application of the Federal Rules of Evidence would not be unduly burdensome because some forms of hearsay evidence could still be admitted under various exceptions to the hearsay rules. But while petitioner correctly observes (Pet. 14-15) that "capture reports and other records made contemporaneously with the prisoner's capture would typically be admissible either as records of regularly conducted activity under Fed. R. Evid. 803(6) or as public records under Fed. R. Evid. 803(8)," that observation does not demonstrate that the court of appeals erred in concluding that hearsay is admissible in Guantanamo habeas proceedings without regard to the Federal Rules of Evidence. On the contrary, petitioner's assertion underscores that the type of "hearsay" typically admitted in such proceedings (capture reports and other documents recording statements made by detainees) is generally reliable and does not unfairly prejudice detainees given the ample opportunities they have to challenge such evidence in district court.

c. As explained above, the district courts have fashioned habeas procedures for Guantanamo detainees that safeguard against the improper use of hearsay evidence by allowing the detainees' counsel access to the evidence and an opportunity to contest the reliability of particular pieces of evidence. See *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168 (1988) (upholding the admission of evidence "subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish [its] weight"). The district courts have generally allowed intelligence reports and expert declarations to be admitted, while the detainee and his counsel have

had substantial opportunities to challenge the government's assertions and to question the evidence. See Pet. App. a64-a73 (Case Management Order). In this case, for example, the government filed a factual return and complied with its obligations to disclose "exculpatory evidence"—that is, evidence that would tend to show that the detention standard is not met. *Id.* at a24-a25. Petitioner's attorneys were granted security clearances and given access to the classified evidence, and petitioner responded to the government's factual return with a traverse. Petitioner also had an opportunity to provide testimony during a three-day merits hearing in order to challenge the accuracy and reliability of any documents summarizing any of his prior statements—which constituted the bulk of the evidence supporting detention in this case. *Id.* at a50 (summarizing admissions by petitioner supporting detention). Although petitioner elected not to testify, that does not demonstrate that the court of appeals erred in holding that hearsay is generally admissible. Instead, petitioner's failure to challenge any specific hearsay evidence as unreliable or inaccurate strongly suggests that there was no prejudice or error in the admission of any such evidence. It also makes this case an unsuitable vehicle for addressing specific questions regarding the reliability of certain categories of hearsay evidence.

2. Petitioner also argues (Pet. 16-17) that application of a preponderance standard is inappropriate, and that "there must be some heightened standard for the quantum of evidence to justify indefinite imprisonment." That argument fails for many of the same reasons that undermine petitioner's challenge to the admissibility of hearsay evidence. Indeed, petitioner cites (Pet. 16) what he characterizes as the admission of "stale and almost

entirely flimsy and untestable hearsay" in this case as one of the reasons why a preponderance of the evidence standard is "particularly inappropriate." As discussed above, however, petitioner had ample opportunity to challenge the government's evidence, and he cannot now invoke unspecified and unchallenged errors in the admission of evidence to support his general argument that a more stringent standard of review is necessary.

a. Habeas proceedings involving military detainees are unique and require a flexible approach tailored to their specific circumstances. While the Court in *Boumediene* held in broad terms that courts considering Guantanamo habeas petitions "must have sufficient authority to conduct a meaningful review of both the cause for detention and the Executive's power to detain," 553 U.S. at 783, it did not specifically address what substantive or procedural standards would be appropriate. See *id.* at 796-797. Instead, the Court directed the district courts to craft appropriate standards, stating that "[t]he extent of the showing required of the Government in these cases is a matter to be determined." *Id.* at 787.

Implementing that directive from this Court, the district courts have reached a consensus that the government should bear the burden of showing, by a preponderance of the evidence, that detention is lawful. See Pet. App. a69 (Case Management Order).[1] And while the court of appeals has suggested that a lower standard of proof might be constitutional, see *Al-Adahi*, 613 F.3d at 1104-1105; *Al-Bihani*, 590 F.3d at 878 & n.4, it has

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[1] When the district court issued its Case Management Order in November 2008 adopting a preponderance standard, the government successfully challenged certain provisions of that order, but did not challenge its adoption of a preponderance standard and determined instead to meet that standard.

held that the preponderance of the evidence standard adopted and applied by all of the district courts satisfies the Constitution. See, *e.g.*, Pet. App. a11-a12; *Awad*, 608 F.3d at 10-11. None of petitioner's arguments demonstrate that the lower courts erred in applying that standard in evaluating his habeas petition.

b. As this Court has explained, "[t]here are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations." *Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973) (internal quotation marks omitted). In *Boumediene*, this Court noted that "[w]here a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing." 553 U.S. at 783. For that reason, in the unique circumstances of the proceedings here, it is appropriate for the government to bear the burden of proof by a preponderance of the evidence, and not to apply the general habeas rule that a petitioner bears the burden to demonstrate his entitlement to the writ. See *Garlotte* v. *Fordice*, 515 U.S. 39, 46 (1995) ("[T]he habeas petitioner generally bears the burden of proof."). The early cases confirm that in cases of Executive detention "the ultimate burden of satisfying the judge" generally rested "with the respondent." R.J. Sharpe, *The Law of Habeas Corpus* 87-88 (1976). The preponderance standard adopted by the district court and upheld by the court of appeals is consistent with that approach because it requires the government to bear the ultimate burden of proof.

In accord with *Boumediene* and that historical background, where (as here) the Executive has not come for-

ward with a prior administrative or judicial adjudication of the matter that might support a more deferential review, the presumptive baseline for civil proceedings—that the party with the burden of persuasion must establish its case by a preponderance of the evidence—should apply. While a higher standard of proof attaches at a criminal trial, it would be inappropriate to apply that standard to this non-punitive, law-of-war detention. This unique setting provides an exception to the general presumption against executive detention, see *United States* v. *Salerno*, 481 U.S. 739, 748 (1987) (exception for detention arising as part of "the exigencies of war"), and "the law of war and the realities of combat may render [military] detentions both necessary and appropriate," *Hamdi*, 542 U.S. at 531 (plurality opinion).

Notably, the Army Regulation that establishes procedures for determining the proper status of certain military detainees in accordance with the laws of war and the Geneva Convention employs a preponderance of the evidence standard. See, *e.g.*, Army Regulation 190-8, ch. 1, § 1-6(e)(9) (1997) (inquiry into prisoner of war status). There is no basis for applying a higher standard here when adjudicating the lawfulness of the Executive's authority to detain an individual under the AUMF, as informed by the laws of war.

Moreover, as the district courts have unanimously held, the preponderance standard appropriately reflects the competing interests at stake in these habeas proceedings as they currently are conducted in the district court. Like any military detainee subject to detention under the laws of war, the individuals captured during the ongoing armed conflict and held at Guantanamo have an obvious interest in securing their liberty. On the other side of the balance, there are "weighty and

sensitive governmental interests in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States." *Hamdi*, 542 U.S. at 531 (plurality opinion). The preponderance standard provides the traditional procedural framework that appropriately balances those interests.

c. Although petitioner insists (Pet. 19) that his liberty interests should tip the balance in favor of review under a more stringent clear-and-convincing-evidence standard, the lower courts' application of a preponderance standard allows for the "meaningful review" this Court envisioned in *Boumediene*, 553 U.S. at 783. Application of a higher standard has no historical support, would be inconsistent with military practices for adjudicating prisoner-of-war status, and would ignore the practical difficulties in obtaining and producing relevant evidence in these military detention cases. See, *e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 Harv. L. Rev. 2029, 2092 (2007) (concluding that "detention on [the basis of a preponderance standard] seems to us to be acceptable in view of the difficulties of collecting and preserving evidence in battlefield conditions"). A higher standard is not necessary for "meaningful review" and would create an inappropriate risk of harm to the government and the public at large, given that wrongfully released fighters could rejoin the battle against United States troops and interests. See *Salerno*, 481 U.S. 748-749 (emphasizing that "society's interest" in detention is "at its peak" in times of war or insurrection").[2]

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[2] Although it is appropriate for the government to bear the burden of proof by a preponderance of the evidence in these unique circum-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 2011

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stances, the same approach may not apply in other contexts of review of military detention. See generally *Boumediene*, 553 U.S. at 786 (noting that "habeas corpus review may be more circumscribed if the underlying detention proceedings are more thorough than they were here"). For example, a formal military adjudication regarding the detainee's status could warrant substantial judicial deference. A less formal military decision might likewise warrant some degree of judicial deference. See, *e.g.*, *Hamdi*, 542 U.S. at 534; see also *Hirota* v. *MacArthur*, 338 U.S. 197, 215 (1949).

* The Acting Solicitor General is recused in this case.

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NO. 10-439

In the Supreme Court of the United States

FAWZI KHALID ABDULLAH FAHAD AL-ODAH, ET AL.,
Petitioners,

v.

UNITED STATES OF AMERICA, ET AL.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court remanded this case to the lower courts to develop appropriate procedures "in the first instance" for habeas hearings challenging indefinite military confinement. 553 U.S. at 733. Those courts have disregarded the statutes, rules, and Supreme Court precedents governing habeas procedures, thereby undermining this Court's decision through procedural rulings. This Court should confirm the required procedural standards necessary to fulfill its decision that Guantanamo detainees are entitled to habeas hearings to test their detention by the executive branch.

In the Brief for Respondents in Opposition ("Opp."), the government states that review of the decision below is not warranted because, in the Guantanamo habeas cases, the Court of Appeals and District Court have consistently upheld the admission of hearsay without regard to the Federal Rules of Evidence and have consistently applied the preponderance of the evidence standard of proof. Opp. at 6-7. It is precisely for these reasons that this Court's review of the Court of Appeals' decision of important federal questions is warranted. The central question in *Boumediene* was not whether the United States could detain individuals in Guantanamo, but rather what process is due to such individuals. The Court's answer – the writ of habeas corpus – requires evidentiary procedures and a standard of proof that truly effectuate the liberty interest embodied in the writ.

Without review, the decision of the Court of Appeals will prescribe the procedures that will apply not only to the Guantanamo habeas cases but to habeas cases involving all future cases of military detention in the "War on Terror," including potential detention of U.S. citizens. The questions presented by this Petition go to the reliability of the fact finding process in habeas cases, and to the heart of the liberty interest protected by the writ of habeas corpus. There is no basis for the rejection of the clear statutory mandates reflected in the Federal Rules of Evidence and 28 U.S.C. § 2246. And this Court has never approved as minimal a burden of proof in cases involving potential lifetime deprivation of liberty as the preponderance of the evidence standard upheld by the D.C. Circuit here. Both of these important federal questions require this Court's review.

> "[I]n our tripartite system of government," it is the duty of this Court to "say 'what the law is.'" *Boumediene v. Bush*, [553 U.S. at 765] (quoting *Marbury v. Madison*, [5 U.S. (1 Cranch) 137, 177 (1803)]). This duty is particularly compelling in cases that present an opportunity to decide the constitutionality or enforceability of federal statutes in a manner "insulated from the pressures of the moment," and in time to guide courts and the political branches in resolving difficult questions concerning the proper "exercise of governmental power." *Hamdan v. Rumsfeld*, 548 U.S. 557, 637 (2006) (Kennedy, J., concurring in part); *see generally Sanchez-Llamas v. Oregon*, 548 U.S. 331, 353–54 (2006); *Hamdan*, [548 U.S. at 588] (quoting *Ex parte*

> *Quirin*, 317 U.S. 1, 19 (1942)). This is such a case. . . . It is incumbent upon us to provide what guidance we can on these issues now. Whatever conclusion we reach, our opinion will help the political branches and the courts discharge their responsibilities over detainee cases, and will spare detainees and the Government years of unnecessary litigation.

Noriega v. Pastrana, 130 S. Ct. 1002, 1002-03, *rehearing denied*, 130 S. Ct. 1942 (2010) (Thomas, J., dissenting from denial of certiorari).

A. Admissibility of Hearsay

The government argues that habeas proceedings for prisoners in military confinement are "unique," and that the Federal Rules of Evidence applicable in all other habeas corpus cases under 28 U.S.C. § 2241 should not apply. Opp. at 7-8. This is a policy argument, not a rule of decision for the district court. The courts are not free to abrogate the Federal Rules of Evidence based on their own policy preferences. Yet, in this case, as in all Guantanamo habeas cases to date, the District Court erred in admitting, over Petitioner's objection, all hearsay evidence, without regard to the restrictions and requirements of the Federal Rules of Evidence.[1]

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[1] As explained in the Petition (at 8), the District Court then relied on hearsay specifically challenged by Petitioner to support its factual conclusions that Petitioner followed a route to Afghanistan traveled by others who allegedly went there for purposes of jihad (App. a36, a38), that he was captured with an-

(footnote cont'd)

In order to escape the plain language of Fed. R. Evid. 1101(e), which applies the Federal Rules of Evidence to habeas corpus cases under 28 U.S.C. § 2241 except as otherwise provided by statute, the government argues that the district court's habeas jurisdiction comes solely from the Constitution, and not from 28 U.S.C. § 2241. Opp. at 10-11. This argument conflicts with two centuries of decisions of this Court, as well as the holding of *Boumediene* itself. It is well established that lower federal courts have no jurisdiction other than that which is conferred by statute. *See Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) ("[T]he courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute . . . ."); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 234 (1922) ("Only the jurisdiction of the Supreme Court is derived directly from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress."); *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) ("All federal courts, other than the Supreme Court, derive their jurisdiction wholly from the exercise of the authority to 'ordain and establish' inferior courts, conferred on Congress by Article III, § 1, of the Constitution."). As this Court held in *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807): "[T]he power to award the writ [of habeas corpus] by any of the courts of the United States, must be given by written law."

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other individual with alleged ties to al Qaeda (App. a44), and that he attended the al Farouq training camp (App. a51, a55).

Boumediene did not overrule this longstanding principle. This Court had previously held in *Rasul v. Bush*, 542 U.S. 466 (2004), that the District Court had jurisdiction in Petitioner's case under 28 U.S.C. § 2241. *See Rasul v. Bush*, 542 U.S. 466 (2004). *Boumediene* held that § 7 of the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 ("MCA"), which amended 28 U.S.C. § 2241 to withdraw habeas corpus jurisdiction, violated the Suspension Clause of the Constitution. *See Boumediene*, 553 U.S. at 795. Because 28 U.S.C. § 2241 is the "statute that would govern in MCA § 7's absence" (*Boumediene*, 553 U.S. at 777), this Court "necessarily restored the *status quo ante*, in which detainees at Guantanamo had the right to petition for habeas under [28 U.S.C.] § 2241." *Kiyemba v. Obama*, 561 F.3d 509, 512 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 1880 (2010).

The recognition of statutory jurisdiction is consistent with other cases in which Congress sought to withdraw jurisdiction from federal courts in an unconstitutional manner. In such cases, the Court has disregarded the unconstitutional withdrawal of statutory jurisdiction, rather than finding a non-statutory source of jurisdiction. *See United States v. Klein*, 80 U.S. (13 Wall.) 128, 147 (1871); *Armstrong v. United States*, 80 U.S. (13 Wall.) 154, 154 (1871).[2]

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[2] *Klein* and *Armstrong* addressed a post-Civil War statute that withdrew from the federal courts jurisdiction to hear claims for recovery of seized property brought by pardoned Confederates. *See* Gordon G. Young, *A Critical Reassessment of the Case Law Bearing on Congress's Power to Restrict the Jurisdiction of the Lower Federal Courts*, 54 Md. L. Rev. 132 (1995); Lawrence G.

(footnote cont'd)

In short, the District Court's jurisdiction in this case comes from 28 U.S.C. § 2241, and not another source.

The government goes on to argue that MCA § 7 and its predecessor, the Detainee Treatment Act of 2005 ("DTA"), demonstrate that Congress did not intend for the Federal Rules of Evidence to apply in habeas corpus proceedings involving military confinement. Opp. at 11-12. In essence, the government suggests that the courts may infer from Congress's attempt to withdraw habeas jurisdiction that Congress would have exempted habeas cases challenging military confinement from the Federal Rules of Evidence if it had known that MCA § 7 violated the Suspension Clause. This argument is sheer speculation. If Congress had intended to exempt this category of habeas cases from the Federal Rules of Evidence, it could have done so in the two years since *Boumediene* was decided – and remains free to do so at any time. But unless and until Congress (or this Court, acting pursuant to its rulemaking capacity under the Rules Enabling Act) modifies the hearsay rules applicable to these cases, the District Court's responsibility is to apply the Federal Rules of Evidence and the habeas statute, not to disregard them based on the government's after-the-fact and counterfactual inferences from the DTA and MCA about Congress's alleged intent. The courts cannot rewrite an unconstitutional statute in order to conform to

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Sager, *Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of the Federal Courts*, 95 Harv. L. Rev. 17, 71 (1981) ("It was clear to the *Klein* Court that Congress could not manipulate jurisdiction to secure unconstitutional ends.").

perceived but unwritten policy objectives. *See United States v. Stevens*, 130 S. Ct. 1577, 1592 (2010); *Reno v. American Civil Liberties Union*, 521 U.S. 844, 884-85 (1997).

B. Standard of Proof

The government misstates the question presented by the Petition as "[w]hether a burden of proof higher than a preponderance of the evidence is constitutionally compelled in these unique habeas proceedings." Opp. at (I). The determination of the appropriate burden of proof in these cases does not depend solely upon the Constitution. As explained in the Petition, where the statute is silent as to the burden of proof, the appropriate burden of proof to be applied in habeas cases challenging military confinement "is the kind of question which has traditionally been left to the judiciary to resolve." *Woodby v. INS*, 385 U.S. 276, 284 (1966). In spite of the government's description of the preponderance standard as the "traditional procedural framework" to balance the prisoner's liberty interests against the nation's security interests, the government cites to no case in which this Court has ever approved anything less than a clear and convincing evidence standard to support prolonged confinement.

In fact, as set forth in the Petition, this Court has never approved less than proof by clear and convincing evidence to support prolonged confinement. *See Woodby*, 385 U.S. at 286 (deportation); *Kansas v. Hendricks*, 521 U.S. 346, 352 (1997) (civil commitment of sex offenders); *Foucha v. Louisiana*, 504 U.S. 71, 81 (1992) (civil commitment of criminal defendant found not guilty by reason of insanity); *United*

States v. Salerno, 481 U.S. 739, 750 (1987) (pre-trial detention based on dangerousness). As this Court held in *Addington v. Texas*, 441 U.S. 418 (1979):

> [C]ivil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection. . . . [T]he individual's interest in the outcome of a civil commitment proceeding is of such weight and gravity that due process requires the state to justify confinement by proof more substantial than a mere preponderance of the evidence.

See 441 U.S. at 425-27. In the military confinement context, as in the civil commitment context, the courts must strike an appropriate balance between liberty and security. In all other such cases, this Court has held that a preponderance of the evidence standard does not reflect "the value society places on individual liberty." *Id.* at 425. This line of precedent should not be abandoned - and certainly not without this Court's review.

The government argues that a preponderance of the evidence standard is consistent with Army Regulation 190-8, which provides for a preponderance of the evidence standard in military tribunals under Article 5 of the Geneva Conventions. The purpose of an Article 5 tribunal under Army Regulation 190-8 is not to determine whether prisoners should be indefinitely detained. It is to provide an expeditious hearing in exigent circumstances to determine whether the prisoner is entitled to the protections of the Geneva Conventions. Moreover, unlike the habeas hearing that Petitioner eventually received, an Article 5

tribunal is conducted at or near the time and place of capture when memories are fresh and eyewitnesses are likely to be available. Of course, no such hearing was conducted in Petitioner's case, and the government has consistently maintained that Petitioner, like all Guantanamo detainees, is not entitled to the protections of the Geneva Conventions. Petitioner's habeas corpus hearing was conducted in the ninth year of his captivity, not on or near a battlefield, but in a federal courtroom half a world away from the place of his capture, using evidence that originated largely from prisoners in Guantanamo and not from any battlefield. "[A]s the period of detention stretches from months to years, the case for continued detention to meet military exigencies becomes weaker." *Rasul*, 542 U.S. at 488 (Kennedy, J. concurring). The deference to Executive authority that might justify a more lenient standard of proof for battlefield hearings does not exist to justify such a standard in the judicial forum in which the Guantanamo cases are decided. The government should meet the burden of proof that this Court has consistently required for judicial determinations affecting individual liberty. This burden is appropriately higher than the burden that might be required in battlefield-expedient hearings, particularly because Petitioner never had such a hearing.

CONCLUSION

The Court should grant the petition for a writ of certiorari to the Court of Appeals.

Respectfully submitted,

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FAWZI KHALID ABDULLAH FAHAD AL-ODAH, et al.,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONERS

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Wigmore, John Henry, 5 Evidence (Chadbourn rev. 1974) 6, 7, 8, 12

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STATEMENT OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with a national membership of more than 12,800 members, including private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges, as well as an additional 35,000 state, local, and international affiliate members. The American Bar Association recognizes the NACDL as one of its affiliated organizations and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases, both civilian and military. Among the NACDL's objectives are to ensure due process for persons accused of crimes or other misconduct and to promote the fair administration of justice. To this end, the NACDL is a frequent participant in matters pending before this Court, including cases arising in

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[1] The parties have consented to the filing of this brief. Counsel of record for both parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. No counsel for a party authored this brief in whole or in part, and no counsel for a party (nor a party itself) made a monetary contribution intended to fund the preparation or submission of this brief.

the national security context. *See, e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008).

The NACDL's interest in supporting this petition for certiorari is two-fold. First, the membership of the NACDL has a strong interest in ensuring that courts apply the standards set forth in the Federal Rules of Evidence whenever those Rules are, by their terms, applicable, and in maintaining the integrity of the rules governing the admissibility of hearsay in particular. Indeed, as set forth below, criminal defense lawyers have relied on these hearsay rules for centuries as a vital tool to ensure that persons facing significant liberty deprivations receive the benefits of meaningful adversarial testing of the prosecution's evidence against them and, ultimately, just verdicts and reliable judgments. Second, the NACDL has a strong interest in preserving meaningful habeas review, which "the Framers considered . . . a vital instrument for the protection of individual liberty." *Boumediene*, 533 U.S. at 743. That review includes the adversarial testing of disputed facts, in accordance with the Rules of Evidence and the provisions of the habeas statute itself.

In concluding that all hearsay was categorically admissible in certain habeas proceedings, the Court of Appeals ignored the clear language of the Federal Rules of Evidence which are, as a matter of congressional mandate, applicable in these habeas proceedings. Further, by requiring district courts to admit hearsay, subject only to their standardless discretion to weigh its probative quality, the Court of Appeals

undermined the reliability, consistency, and predictability of habeas review. The consequences of this ruling are far-reaching, drawing the integrity of all detention hearings – and indeed all habeas proceedings – into question. For these reasons, the NACDL urges this Court to grant the petition for certiorari and bring clarity and uniformity to this now-troubled area of law.

SUMMARY OF ARGUMENT

Our adversarial system of justice rests upon the principle that cross-examination is a necessary tool for the testing of evidence. For centuries, courts have recognized that because hearsay cannot be tested through cross-examination, its use undermines the fairness and reliability of adversarial proceedings. As a result, courts have long applied the rule that hearsay is generally inadmissible in civil and criminal proceedings, absent certain established exceptions or exclusions. The Federal Rules of Evidence embrace this common-law framework, and reflect a careful balancing by Congress of the value of admitting relevant evidence on the one hand, and the need to exclude evidence that lacks reliability and legitimacy on the other.

While the Court of Appeals sought to carve out a special rule for certain habeas petitions, no such exception is warranted by either the text of the Rules or the longstanding policies that underlie the hearsay

prohibition. The hearsay provisions in the Federal Rules of Evidence expressly apply to habeas proceedings, subject to certain procedural protections provided by statute. Nor is the need for clear standards governing the admissibility of evidence any less pronounced in habeas cases in general or in those involving Guantánamo detainees in particular. Indeed, the application of the hearsay rules are particularly important in national security cases because the hearsay sought to be admitted – often the statements of other detainees – is often inherently unreliable, at least in part because many such statements involve double or triple hearsay and were frequently obtained through coercive interrogation techniques or even torture.

The application of the Federal Rules of Evidence in these cases would not unduly hamstring the government. To the contrary, the exceptions to the hearsay rule allow the government and habeas Petitioners alike to introduce those proofs which are deemed reliable, while subjecting that which ought to be subjected to adversarial testing to appropriate cross-examination. Moreover, the government, habeas Petitioners, and the very legitimacy of habeas proceedings themselves all benefit from the application of the clear standards of the Federal Rules of Evidence and the decades of case law interpreting them.

This petition for certiorari raises critical issues regarding the general applicability of the hearsay rules and, indeed, the Federal Rules of Evidence as a whole. It also raises significant questions regarding

the process applicable to habeas proceedings in general and to those involving Guantánamo detainees in particular. This Court should grant the petition of certiorari to reaffirm the applicability of the hearsay rules to all habeas proceedings, and to assure that such proceedings, given their critical importance to our system of justice, are characterized by meaningful, reliable, and fair adversarial process.

ARGUMENT

I. THE HEARSAY FRAMEWORK IN THE FEDERAL RULES OF EVIDENCE REFLECTS CAREFUL POLICY JUDGMENTS ROOTED IN THE IMPORTANCE OF CROSS-EXAMINATION IN THE ANGLO-AMERICAN ADVERSARIAL TRADITION

The rule against hearsay is rooted in the Anglo-American reliance on an adversarial system of justice, in which cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316 (1974). Because hearsay cannot be tested through cross-examination, its use can call into question the fairness and reliability of adversarial proceedings. For this reason, both England and the United States historically recognized a general rule that hearsay should be excluded from court proceedings, subject to established exceptions. In enacting the Federal Rules of Evidence, Congress endorsed and adopted this common-law framework. These

Rules reflect a careful balancing by Congress, as well as by the Supreme Court and the Federal Rules of Evidence Advisory Committee, between the importance of admitting potentially relevant evidence and the need to ensure its reliability and legitimacy, including in the context of habeas proceedings. This balancing should not be upended without congressional action.

A. Both the Common Law and the Federal Rules of Evidence Reflect the Policy Judgment that Restricting Hearsay is Necessary to Ensure the Fairness and Reliability of Judicial Proceedings

Under both the common law and the Federal Rules of Evidence courts have long barred the admissibility of hearsay, unless subject to an established exception, because of the importance of cross-examination as a means of testing the reliability of evidence. Indeed, objections to the use of hearsay were documented in England as early as the sixteenth century. *See* 5 John Henry Wigmore, Evidence § 1364 (Chadbourn rev. 1974) ("[I]t was discussed in Queen Mary's reign (1553), whether, of the two accusers required in treason, one could satisfy by reporting hearsay."). By the end of the eighteenth century the modern law of hearsay was firmly established in England, with most of the common-law exceptions already in place. *See* T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 Iowa L. Rev. 499, 533-37 & nn.263-72 (1999) (citing cases).

Legal historians have identified two key developments that contributed to the emergence of the hearsay rule and its exceptions. First, by the seventeenth century, the role of the fact-finder in judicial proceedings in England had changed from an inquisitorial model, in which fact-finders were permitted to conduct independent investigations, to a model in which fact-finders were limited to the consideration of evidence that was presented to them at trial. *See* 5 Wigmore, *supra*, § 1364; *see also* Model Code of Evidence ch. VI, introductory cmt. (1942) ("As our system changed in character from investigative to adversary the rule rejecting hearsay and the rule making opportunity for cross-examination a requisite of admissibility developed side by side."). Second, the latter half of the eighteenth century saw a rapid rise in the use of lawyers in English criminal trials, whose principal role was to cross-examine witnesses.[2] *See* John H. Langbein, *The Historical Foundations of the Law of Evidence*, 96 Colum. L. Rev. 1168, 1197 (1996); Gallanis, *supra*, at 545. This "new spirit of adversarialism" in criminal trials led attorneys to focus on evidentiary objections, particularly regarding evidence that denied them the opportunity for cross examination. Gallanis, *supra*, at 551. Hearsay objections then quickly migrated to civil trials, as criminal

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[2] Although lawyers had been common in civil trials since the Middle Ages, cross-examination was a less-significant tool in civil trials – which also relied principally upon written evidence – than in criminal trials at the time the hearsay rules developed. Gallanis, *supra*, at 511-12, 545-46.

attorneys who also practiced in civil cases began raising these objections in civil trials as well. *Id.* at 549-51. As reflected in its history, the hearsay framework thus rests upon the theory "that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." 5 Wigmore, *supra*, § 1420; *see also Dysart Peerage Case*, 6 App. Cas. 489, 503 (1881) (Lord Blackburn) ("In England hearsay evidence . . . as a general rule is not admissible at all.").

The courts of the United States likewise embraced the common-law hearsay framework in the late eighteenth and early nineteenth centuries, concluding that hearsay was generally not admissible, unless subject to an established exception. *See, e.g.*, *State v. Baynard*, 1 Del. Cas. 662, 1794 WL 184, at *1 (Del. O & T 1794) (hearsay is generally inadmissible but is subject to exceptions); *State v. Webb*, 2 N.C. (1 Hayw.) 103, 1794 WL 98 (N.C. Super. L. & Eq. 1794) (per curiam) (court refused to admit a deposition because "no man shall be prejudiced by evidence which he had not the liberty to cross examine"). These cases reflect the same policy concerns about the unreliability and unfairness of basing decisions on evidence not subject to cross-examination. For example, in *Queen v. Hepburn*, this Court explained the policy justifications for the general rule excluding hearsay, citing "[i]ts intrinsic weakness, its incompetency to satisfy the mind of the existence of the fact, and

the frauds which might be practiced under its cover." 11 U.S. 290, 296 (1813) (Marshall, J.). This Court further warned against "lightly yielding to the introduction of fresh exceptions to an old and well established rule: the value of which is felt and acknowledged by all." *Id.* State courts also warned about the unacceptable "doubts and difficulties" that arise from relying upon hearsay evidence. *Coleman v. Southwick*, 9 Johns. 45, 50 (N.Y. 1812) (Kent, C.J.). Thus,

> A person who relates a hearsay, is not obliged to enter into any particulars, to answer any questions, to solve any difficulties, to reconcile any contradictions, to explain any obscurities, to remove any ambiguities: he intrenches [sic] himself in the simple assertion that he was told so, and leaves the burden entirely on his dead or absent author.

Id. (internal quotation marks omitted); *see also Marshall v. Chicago & Great E. Ry.*, 48 Ill. 475, 476 (1868) (Breese, C.J.); ("[Hearsay] statements are not subjected to the ordinary tests required by law for ascertaining their truth[.]"). Indeed, the same policy concerns about the importance of cross-examination underlie the Bill of Rights guarantee of the right of confrontation in criminal cases. *See Giles v. California*, 554 U.S. 353, 499 (2008) ("[I]t seems apparent that the Sixth Amendment's Confrontation Clause and the evidentiary hearsay rule stem from the same roots.") (quoting *Dutton v. Evans*, 400 U.S. 74, 86 (1970) (plurality)).

In the twentieth century, attempts in the United States to alter the common-law hearsay framework met with strong resistance. For instance, the Model Code of Evidence, promulgated by the American Law Institute in 1942, proposed to "work[ ] radical changes in the common law," by admitting hearsay whenever the declarant was either "unavailable as a witness" or "present and subject to cross-examination." Model Code of Evidence Rule 503 & cmt. a (1942). In part due to its radical reworking of the hearsay rules, however, the Model Code was soundly rejected and was not adopted in a single state. *See* Roger Park, *A Subject Matter Approach to Hearsay Reform*, 86 Mich. L. Rev. 51, 53 (1987).

By contrast, in enacting the Federal Rules of Evidence in 1975, Congress endorsed the common-law principle that hearsay should generally be inadmissible, subject to exceptions and exclusions based upon the judgment that certain forms of hearsay possess sufficient guarantees of trustworthiness for admissibility or are admissible for other policy reasons.[3] *See* Advisory Committee's Notes on Article VIII of the Fed. R. Evid. ("The approach to hearsay in the rules is that of the common law, *i.e.*, a general rule

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[3] Congress played an active role in adopting the Federal Rules of Evidence, statutorily prohibiting the Rules from taking effect without specific legislation, and, through its judicial committees, conducting a thorough review of the Rules and making amendments. *See* Eileen A. Scallen, *Interpreting the Federal Rules of Evidence*, 28 Loy. L.A. L. Rev. 1283, 1290 (1995).

excluding hearsay, with exceptions[.]").[4] The Rules provide that hearsay is generally inadmissible, subject to a series of exceptions and exclusions that closely track the common law while providing for certain modifications.[5] This framework applies in habeas proceedings as well, although as discussed *infra* in Part II, Congress provided for another means of admitting

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[4] This Court has recognized that the Advisory Committee's Notes are "a respected source of scholarly commentary," *Tome v. United States*, 513 U.S. 150, 160 (1985) (Kennedy, J., plurality); *see also id.* at 167 (Scalia, J., concurring) (notes are "persuasive scholarly commentaries"), and therefore are "particularly relevant in determining the meaning" of the Rules, *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 165-66 n.9 (1988). *Accord Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (recognizing writings of Reporter of Advisory Committee as persuasive authority regarding meaning of Rules). Here, the Advisory Committee's Notes are cited as persuasive indicators of the relationship between the Rules and common law, and the approach and intent of the Advisory Committee in drafting the Rules.

[5] Article VIII of the Federal Rules of Evidence provides a framework for hearsay evidence. Rule 801 defines hearsay and provides that certain prior statements by a witness and admissions by a party-opponent are not hearsay, while Rule 802 provides the general rule that hearsay is not admissible, except as provided by other Rules. Rule 803 sets forth exceptions that apply regardless of the availability of the hearsay declarant, and Rule 804 delineates exceptions that apply only where the hearsay declarant is unavailable to testify as a witness. Rule 807 describes the "residual exception" to the hearsay rule, providing for certain specific circumstances where hearsay might be admissible. Where a Federal Rule departs from the common-law hearsay exception, the Advisory Committee's Notes so disclose. *See, e.g.*, Advisory Committee's Notes on Fed. R. Evid. 804(b)(2) (1972 Proposed Rules) (exception for dying declarations is "expanded somewhat beyond its traditionally narrow limits").

hearsay in the habeas context, while continuing to endorse the principle that declarants should be subject to adversarial questioning.

Most fundamentally, the Rules endorse the common-law principle that the most reliable evidence is that adduced by live testimony, under oath, in the personal presence of the trier of fact, and subject to cross examination. *See id.* Of these conditions, cross examination is central, and is the "vital feature" of the Anglo-American system. *See id.* (quoting 5 Wigmore, *supra*, § 1367); *see also id.* ("[C]ross-examination is effective in exposing imperfections of perception, memory, and narration[.]") (citing Edmund M. Morgan, *Foreword* to Model Code of Evidence 37 (1942)).

Of course, exceptions and exclusions to the hearsay prohibition are also provided for under the Rules, but only when the evidence arises in circumstances that "furnish guarantees of trustworthiness" that would ordinarily be supplied by cross examination, *id.*, or when other policy reasons makes their admission appropriate. *See, e.g.*, Advisory Committee's Notes on Fed. R. Evid. 803 (1972 Proposed Rules) (Rule 803 "proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available"); Advisory Committee's Notes on Fed. R. Evid. 804(b)(1) (1972 Proposed Rules) (noting that former testimony given under oath and subject to cross-examination lacks only "one of the ideal conditions for the giving of

testimony," presence); Advisory Committee's Notes on Fed. R. Evid. 801(d) (1972 Proposed Rules) (Rule 801(d) excludes admissions by a party-opponent from the definition of hearsay "on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule"); Advisory Committee's Notes on Fed. R. Evid. 804(b)(6) (1997 Amendments) (forfeiture by wrongdoing exception "recognizes the need for a prophylactic rule to deal with abhorrent behavior which strikes at the heart of the system of justice itself" (internal quotation marks omitted)).

The importance or necessity of the evidence is, however, not alone sufficient justification for admitting hearsay, reflecting the judgment of Congress, the Supreme Court, and the Advisory Committee that some hearsay is inappropriate for consideration even under the most compelling circumstances. *See* Fed. R. Evid. 807 (a statement is admissible under the "residual exception" only if, *inter alia*, it has "equivalent circumstantial guarantees of trustworthiness" to statements admitted under Rule 803 or Rule 804); *see also Schering Corp. v. Pfizer Inc.*, 189 F.3d 218 (2d Cir. 1999) (Sotomayor, J.) ("[W]e have often admitted surveys that are relevant to prove material facts under the residual hearsay rule on the basis simply of their need *plus adequate guarantees of trustworthiness*." (emphasis added)).

B. The Federal Rules of Evidence Reflect a Careful Balancing Between the Value of Admitting Evidence and the Need to Ensure its Reliability and Legitimacy

As discussed above, the Rules of Evidence were not adopted casually. Rather, the Rules, including the hearsay rules, reflect a careful balancing by Congress, as well as the Supreme Court and the Advisory Committee, of the value of admitting relevant evidence on the one hand and the need to exclude evidence that lacks reliability and legitimacy on the other. Courts should not set aside these policy judgments in favor of a largely *ad hoc* process of evaluating hearsay evidence; ultimately, Congress's considered judgment must be respected.

The "residual exception" to the hearsay rule, currently codified in Rule 807,[6] exemplifies this careful balancing. The proposed rule submitted to Congress by the Supreme Court provided for a broad residual exception to the hearsay rule, admitting any hearsay statement found to have "comparable circumstantial guarantees of trustworthiness." However, the House of Representatives deleted this provision as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The Senate then proposed a rule of "much

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[6] In 1997, the contents of Rule 803(24) and Rule 804(b)(5) were combined and transferred to a new Rule 807. *See* Advisory Committee's Notes on Fed. R. Evid. 807 (1997 Amendments).

narrower scope," which was ultimately adopted, to ensure that the residual exception did not "emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules." Under this revised version, a court must determine that comparable circumstantial guarantees of trustworthiness exist as well as that the statement is offered as evidence that is "more probative" of a "material fact" than any other evidence obtainable by "reasonable efforts," and that admission will serve "the interests of justice." *See* Notes on Fed. R. Evid. 803 (1974 Enactment).

Similarly, the development of the business records exception to the hearsay rule demonstrates the congressional effort to strike the right balance. *See* Fed. R. Evid. 803(6). While the proposed rule submitted to Congress would have admitted records made "in the course of a regularly conducted activity," the House of Representatives amended the rule to be limited to business activities, expressing concern that "there were insufficient guarantees of reliability" in the proposed rule's broad definition; meanwhile, the Senate worried that the House's amendments would exclude school, church, and hospital records. The final rule provided that the records must be those of a regularly conducted business activity, but defined "business" to include institutions and associations. *See* Notes on Fed. R. Evid. 803(6) (1974 Enactment). Likewise, the proposed Rule 804(b)(2)'s exception for dying declarations would have extended the hearsay exception to all civil and criminal cases. However, the

House of Representatives "did not consider dying declarations as among the most reliable forms of hearsay," and therefore "amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present." This amendment was ultimately adopted in the final Rule. Notes on Fed. R. Evid. 804(b)(2) (1974 Enactment).

Likewise, the Rules also modified common-law rules based on the policy judgments of Congress, as well as the Advisory Committee and the Supreme Court. For example, the Rules depart from the common law and now permit the admission of prior consistent statements of a witness as substantive evidence under a "gamesmanship" theory. *See* Advisory Committee's Notes on Fed. R. Evid. 801(d) (1972 Proposed Rules) ("[I]f the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.").

The hearsay framework codified by the Rules of Evidence has a long-established pedigree, firmly rooted in our adversarial system of justice, that reflects the principle that cross-examination is a critical tool for testing the reliability of evidence and is also embodied in the Confrontation Clause. Yet the Rules go beyond mere recitation of historical standards: they reflect carefully considered judgments of the Supreme Court, the Advisory Committee, and Congress, both that hearsay should be generally inadmissible, and that courts' authority to admit hearsay

should be subject to limited, clearly-stated rules. Creating wholesale exceptions for certain habeas proceedings without statutory support disregards this careful balancing.

II. THE ADMISSION OF HEARSAY EVIDENCE IN HABEAS CORPUS PROCEEDINGS TESTING THE LEGALITY OF DETENTION IS INCONSISTENT WITH THE PURPOSE AND IMPORTANCE OF THE WRIT AND THE RULES OF EVIDENCE

In determining that hearsay "is always admissible" in detainee habeas corpus proceedings, App. a12 (quoting *Al-Bihani v. Obama*, 590 F.3d 866 (D.C. Cir. 2010)), the lower courts in this case not only eschewed a rule deeply embedded in our common law and constitutional jurisprudence, but also abandoned a fundamental means by which our adversarial system ensures the reliability, fairness, and legitimacy of judicial proceedings. This was a critical error: habeas corpus is designed to "protect against the arbitrary exercise of governmental power," *Boumediene*, 533 U.S. at 794, and to serve as "a critical check on the Executive," *Hamdi v. Rumsfeld*, 542 U.S. 507, 525 (2004), and as a "stable bulwark of our liberties," William Blackstone, 1 Commentaries *137. Accepting hearsay evidence on a categorical basis in certain habeas proceedings undermines the very function of the Great Writ, drawing the integrity of detention proceedings – and indeed all habeas proceedings – into question.

A. Congress has Determined that the Rules of Evidence Apply in Habeas Corpus Proceedings

It has been said that "there is no higher duty than to maintain [the writ of habeas corpus] unimpaired." *Bowen v. Johnson*, 306 U.S. 19, 26 (1939); *see also Boumediene*, 533 U.S. at 739-42 (recounting Parliamentary attempts to secure the writ by statute from the Magna Carta through the Habeas Corpus Act of 1679). This lesson was understood by the Framers, who included protection for the privilege of habeas corpus in "a Constitution that, at the outset, had no Bill of Rights." *Id.* at 739.

Congress has continued to recognize the importance of habeas corpus as an instrument of individual liberty. One way it has done so is by assuring that the Rules of Evidence – including rules regarding hearsay – generally apply to habeas proceedings, Fed. R. Evid. 1101(e), subject only to the statutory provision that permits the consideration of affidavits, in the trial court's discretion, 28 U.S.C. § 2256. *Accord* Advisory Committee's Notes on Fed. R. Evid. 1101(d) (citing *Townsend v. Sain*, 372 U.S. 293, 311, 322 (1963) (recognizing necessity of trial-like procedures in habeas corpus actions)); *see also Greiner v. Wells*, 417 F.3d 305, 325-26 (2d Cir. 2005), *cert. denied*, 546 U.S. 1184 (2006) (excluding hearsay in a habeas case pursuant to Rules). Indeed, even the statutory exception for the use of affidavits in habeas proceedings provides for adversarial testing of the affiant, by providing parties with the right to

"propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246. In the context of habeas proceedings, then, Congress gave judges added flexibility to admit certain kinds of hearsay evidence, while continuing to accept the general principle that hearsay is inadmissible. This statutory structure may not be ignored.

Yet, the Court of Appeals treats the statement of four justices of this Court in *Hamdi v. Rumsfeld*, that hearsay "may need to be accepted as the most reliable available evidence," 542 U.S. at 533-34, as effectively foreclosing any challenge to the use of hearsay evidence in detainee habeas proceedings. App. a11-a12 (citing *Hamdi* and "dispatch[ing]" claim "in short order"); *see also Al-Bihani*, 590 F.3d at 879 (citing *Hamdi* and reasoning that "habeas review for Guantánamo detainees need not match the procedures developed by Congress and the courts specifically for habeas challenges of criminal convictions"). But, the *Hamdi* plurality's statement that hearsay "may" sometimes be "the most reliable evidence" is best understood as an acknowledgment that the district court has discretion to admit affidavits under 28 U.S.C. § 2246. *See* 542 U.S. at 538 ("[A] habeas court in a case such as this may accept affidavit evidence[.]").

To nonetheless view the statement in *Hamdi* as the lower courts have done impermissibly "expand[s] by court decision" the process for modifying the procedural rules outlined in 28 U.S.C. §§ 2073 and 2074. *Cf. Swint v. Chambers County Comm'n*, 514 U.S. 35,

48 (1995) (courts should follow the procedure for changing rules outlined by Congress in the Rules Enabling Act). Subject to congressional approval, this Court could, of course, alter the rules applicable to habeas corpus proceedings through the exercise of its rulemaking power under the Rules Enabling Act, 28 U.S.C. § 2072, *et seq.* It has not done so.

Moreover, the lower courts failed to consider the *Hamdi*'s comment in light of this Court's subsequent decisions. In *Boumediene v. Bush*, 553 U.S. 723 (2008), this Court emphasized that habeas procedures must be sufficient to allow detainees "a meaningful opportunity" to challenge their detention, *id.* at 779, particularly where the underlying administrative hearings designating them "enemy combatants" readily admitted hearsay – thus presenting a "considerable risk of error." In the context of indefinite detention without criminal charge, such procedural deficiencies were simply "too grave to ignore." *Id.* at 785; *see also Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006) (the challenged military commission violated the Uniform Code of Military Justice and the Geneva Conventions, in part because of the "striking" fact that such commissions "permit the admission of *any* evidence" including "testimonial hearsay and evidence obtained through coercion").

This Court's review is thus necessary to ensure that lower courts do not continue to interpret *Hamdi* as overruling, *sub silentio*, a congressional directive to apply the Federal Rules of Evidence in habeas proceedings, and to guarantee that detainees receive

the "meaningful opportunity" guaranteed by *Boumediene* to challenge their potentially lifetime detention. The writ of certiorari should be granted.

B. The Rules of Evidence are Necessary in This and Other Habeas Proceedings in Order to Ensure that an Individual's Detention is Not Arbitrary and Unlawful

As a practical matter, as well, application of the hearsay rule to habeas proceedings, including detention determinations, is critical. A review of the types of evidence that are admitted in the absence of age-old limits on hearsay evidence reveals the fundamental importance of the hearsay rule to the proper functioning of habeas proceedings.

In one proceeding, for example, the government sought to detain an individual indefinitely based upon interview reports containing the hearsay statements of other detainees which were not only "obtained by torture," but also "contai[ned] second- and third-hand hearsay," and did not "purpor[t] to be verbatim account[s] of what was said." *Ali Ahmed v. Obama*, 613 F.Supp.2d 51, 55 (D.D.C. 2009). In other proceedings the government has offered, for example, intelligence reports "contain[ing] triple hearsay" from an unknown source without any indication of "the circumstances in which the report's source obtained the information," *Abdu Anan v. Obama*, No. 04-1149, unclassified slip op. at 15-16 (D.D.C. Jan. 6, 2010),

statements from an unnamed source contained in a classified document, *Boumediene v. Bush*, No. 04-01166, unclassified slip op. at 10 (D.D.C. Dec. 9, 2008), statements found in a diary of another detainee, *Barhouni v. Obama*, No. 09-5380, unclassified slip op. at 20 (D.C. Cir. June 11, 2010), and the statements of another detainee whose credibility "has been seriously called into question by the Government personnel who have specifically cautioned against relying on his statements," *El Gharani v. Bush*, No. 05-429, unclassified slip op. at 8 (D.D.C. Jan. 14, 2009).[7]

Admission of this type of rank hearsay evidence is not only contrary to the fundamental precepts of our adversarial system of justice, but risks erroneous decisionmaking in cases in which the gravest of infringements on liberty – indefinite detention without

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[7] Deeply unreliable evidence appears to form the core of the government's case in a substantial number of habeas proceedings. For example, Mohammed al-Qahtani, who was subject to extreme interrogation techniques that almost resulted in death, *see* Adam Zagorin, *Inside the Interrogation of Detainee 063*, TIME, June 12, 2005, "[p]rovided detailed information about 30 of Osama Bin Laden's bodyguards who are also held at Guantanamo." U.S. Dep't of Defense News Release, Guantanamo Provides Valuable Intelligence Information, June 12, 2005, *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=8583. *See also* Del Quintin Welber, *Detainee-Informant Poses Quandary for Government*, WASH. POST., Feb. 9, 2009 (reporting that detainee Yasim Muhammed Basardah provided evidence of highly questionable reliability on scores of detainees he claims to have seen at an Al Farooq training camp, in exchange for favorable treatment by the government).

charge – is at stake.[8] Indeed, without the opportunity for cross-examination or, at the very least, use of the adversarial tools afforded under 28 U.S.C. § 2246, in many instances the fact that statements were coerced through torture or abuse will go undetected. Even though some district courts may discount the weight of such hearsay statements in cases where they are manifestly unreliable, *see, e.g., Ali Ahmed*, 613 F.Supp.2d at 57 (determining that inculpatory statements of other detainee recounting overheard conversations at Guantánamo "have little evidentiary value"), they are doing so absent the concrete, comprehensible standards that the Federal Rules of Evidence are designed to ensure.[9] Further, the standards governing hearsay embodied in the Federal Rules of Evidence are themselves informed by a body of case law that properly constrains discretion and promotes consistency, predictability, and fairness in

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[8] The potential for such erroneous decisionmaking is even more pronounced given that the standard of proof in detainee habeas proceedings is the minimal "preponderance of the evidence" standard. *Amicus* NACDL joins the Petitioner in challenging this standard of proof, which is inappropriate and insufficient under these circumstances. *See* Pet. Br. 16-19.

[9] Such an *ad hoc* approach to evaluating the reliability of hearsay on a case-by-case basis was considered and rejected by the Advisory Committee in promulgating the Federal Rules. Even with additional procedural safeguards including notice requirements, the Advisory Committee concluded that this approach "involv[ed] too great a measure of judicial discretion." Advisory Committee's Notes on Art. VIII of the Fed. R. Evid. (citing proposal of Jack B. Weinstein, *The Probative Force of Hearsay*, 46 Iowa L. Rev. 331 (1961)).

applying the Rules. Thus, the *per se* admission of hearsay evidence in habeas cases, and the broad, standardless discretion employed by the district courts to weight such evidence, is at odds with the "vital" role of habeas corpus in guarding "against the arbitrary exercise of governmental power." *Boumediene*, 533 U.S. at 739, 794.

Nor would the application of the Rules of Evidence to these proceedings impose an undue burden on the government. Indeed, many of the hearsay exceptions embodied in the Rules could, as Petitioner highlights, potentially be applicable here. *See* Pet. Br. 14-15 (discussing applicability of exceptions for records of regularly conducted activities, Fed. R. Evid. 803(6), public records, Fed. R. Evid. 803(8), statements against interest, Fed. R. Evid. 804(b)(3), and the residual exception, Fed. R. Evid. 807); *see also Sulayman v. Obama*, No. 05-2386, unclassified slip op. (D.D.C. July 21, 2010) (treating detainee's prior statements as non-hearsay party admissions under Fed. R. Evid. 801(d)(2)). Those exceptions, grounded as they are in the statutorily-recognized reliability of such evidence, or in other legitimate policy justifications, ought to be the subject of appropriate analysis and determination under the Rules of Evidence, as they are in all other cases.

Indeed, there appears to be no limiting principle to the lower courts' decisions. If Rule 1101(e) can be ignored by judicial decree in these Guantánamo

habeas cases, then they can be ignored in other habeas cases as well.[10] If we are to walk away from our age-old tradition of presumptively rejecting the admissibility of hearsay, this momentous step should be taken by Congress, not the courts.

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[10] Nor is any potential concern that national security will be compromised should hearsay be rendered inadmissible a valid one. Leaving aside that such a concern is not embodied in any rule of evidence, courts have shown, in the context of these and other cases, that they are capable of addressing such concerns without undermining their ability to adjudicate cases fairly and accurately. *See* App. a26 (Case Management Order providing for treatment of classified information); *see also Parhat v. Gates*, 532 F.3d 834, 849 (D.C. Cir. 2008) (recognizing that district courts have effective tools to protect "highly sensitive" sources and methods).

CONCLUSION

For the foregoing reasons, *amicus curiae* NACDL respectfully submits that the petition for writ of certiorari should be granted.

Respectfully submitted,

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